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Parish

2689

No. 12867

United States
Court of Appeals
for the Ninth Circuit.

See vol. 2688

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

Transcript of Record
In Two Volumes
Volume II
(Pages 463 to 891)

No.
UNITED STATES COURT OF APPEALS
THE NINTH CIRCUIT
FILED
JUL 31 1951
PAUL P. O'BRIEN
CLERK

Petition For Review of Orders of the Civil Aeronautics Board.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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Petition For Review of Orders of the Civil Aeronautics Board.

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(Testimony of A. W. Stephenson.)

Redirect Examination

By Mr. Bennett:

Q. This agreement to arbitrate, the machinery is now in process; is that right?

A. That is right.

Q. Isn't it true that there is a time limit upon the matter?

A. That is right. The Board must meet on the 28th, and must have a report, a recommendation back ready to submit if the Examiner will accept it, by the 13th of December.

Q. Do you know if application has been made for the arbitrator—I mean the neutral—— [2246]

A. That is right. We have already asked that the neutral be provided.

Q. Now, this recommendation that comes out of this arbitration is for anybody in this case who wishes it; isn't that true? United, Western, the C.A.B.? A. That is right.

Q. It isn't your understanding that this decision would be binding upon anybody but the parties to the arbitration; isn't that right?

A. That is right.

Mr. Bennett: Nothing further.

Mr. Kennedy: Mr. Examiner, may I ask for one other thing?

Examiner Wrenn: All right.

(Testimony of A. W. Stephenson.)

Recross-Examination

By Mr. Kennedy:

Q. Do you have now a written question or questions to be submitted to the arbitrator? Has that been agreed upon?

A. We have a written question.

Q. Do you have that with you?

A. Yes, I believe I have.

Examiner Wrenn: Is he, the witness, to do it, Mr. Bennett?

Mr. Bennett: No, he isn't.

Mr. Kennedy: Well, I don't care, so long as it is made available, Mr. Examiner.

Examiner Wrenn: Well, you do have the question, Captain?

The Witness: We have the procedure, completely outlining [2247] the problems.

Examiner Wrenn: I know that, but I understood Mr. Kennedy to ask you if you had a specific question that the arbitration board is to be asked to decide.

Mr. Kennedy: As I understand the mechanism, you agree in writing what the issue is. I would like to see what the written question is.

The Witness: I have it here with me in Washington. I don't believe that——

Mr. Kennedy: I wonder if we could ask counsel for A.L.P.A. to make that available to us.

Mr. Bennett: I will endeavor to make it available.

Examiner Wrenn: All right.

You are excused.

(Witness excused.)

Examiner Wrenn: Now, back to the request of Mr. Reilly for the minutes of these meetings.

Do I understand your position to be that you don't know whether there is anything in that way, and you object to furnishing it?

Mr. Bennett: I am not in a position to agree to furnish it. I don't know whether there are written minutes. That I don't know about. I can let Mr. Reilly know.

Examiner Wrenn: Would you like to have over the period of noon recess to look into that and give me an answer to it one way or the other?

Mr. Bennett: Yes, this afternoon I can do that.

Examiner Wrenn: Let us take a five-minute recess.

(There was a short recess taken.) [2248]

Examiner Wrenn: All right, gentlemen, let's have your attention.

Call your next witness, Mr. Bennett.

Mr. Bennett: Mr. Unterberger, please.

Whereupon,

S. HERBERT UNTERBERGER

was called as a witness by and on behalf of the Air

(Testimony of S. Herbert Unterberger.)

Line Pilots Association, and, having been first duly sworn, was examined and testified as follows:

Examiner Wrenn: Will you give your name to the reporter?

The Witness: S. Herbert Unterberger, 510 Standard Oil Building, Washington, D. C.

Direct Examination

By Mr. Bennett:

Q. What is your business or occupation, Mr. Unterberger? A. I am a research economist.

Q. Did you give the name of your business to the reporter?

A. I am director of research of the Labor Relations Information Bureau in the Standard Oil Building.

Q. How long have you been engaged in this character of work? A. In excess of 15 years.

Q. Now, will you state to the Examiner your qualifications?

A. Well, I am presently director of research and a partner in the Labor Relations Information Bureau, which is a private economic research organization handling research and [2249] analysis for a wide variety of clients that vary from labor unions, trade unions, trade associations, and so forth. I have been engaged in that work since early in 1947.

Prior to that time I was head economist with the Office of War Mobilization and Reconversion.

(Testimony of S. Herbert Unterberger.)

During the war I was director of the Analysis Division of the War Labor Board. Prior to the war I was economist with the Railway Retirement Board, Pennsylvania Department of Labor and Industry, and carried on a variety of economic studies in the field of labor utilization and labor productivity for several Government agencies dating back to the middle of 1935.

I hold degrees from the Wharton School of Finance and Commerce, University of Pennsylvania, and the graduate school of that same institution.

Q. Did you prepare A.L.P.A. Exhibits 2 through 16 that were filed in this cause previously?

A. They were prepared under my supervision. I take it you mean Exhibits 2 through 16 that were attached—that were filed at some time prior to yesterday morning?

Q. That is right. A. That is right, yes.

Examiner Wrenn: Off the record here.

(Discussion off the record.)

Examiner Wrenn: Back on the record.

Go ahead.

Q. (By Mr. Bennett): From what source of material were these exhibits compiled? [2250]

A. They were all derived from the reports made by the various carriers to the Civil Aeronautics Board, or reports compiled by the Civil Aeronautics Board, or in the case of one exhibit—No. 16—the source of that was the schedules published in the Official Guide of the Aidways, the Air Traffic Guide,

(Testimony of S. Herbert Unterberger.)

and the Official Air Line Guide. All of those things are really one publication under a successive variety of names.

Let me change that: A variety of successive names.

Q. And what is the ultimate source of this material? Does it come from the companies themselves? I mean the original source of the material?

A. Yes.

Q. They are reports made to the Government by the companies; is that true?

A. Except for that one exhibit where apparently the information is filed with the publishers of the Official Air Line Guide.

Q. By whom? By the companies?

A. I assume by the companies.

Q. Yes.

A. Now, will you look at Exhibits 2 through 16, Mr. Unterberger?

Mr. Reilly: Excuse me a minute.

Where did he say he got the information for this material? What was the source?

Would you read back that answer?

(The answer was read.)

Mr. Reilly: All you are talking about now are the [2251] statistics themselves and not any argumentative matter that might appear in the summaries or explanations? You surely didn't get these explanations out of any official document.

The Witness: Obviously.

(Testimony of S. Herbert Unterberger.)

Mr. Reilly: That is all I wanted to know.

Q. (By Mr. Bennett): You are speaking of——

Mr. Reilly: Exhibits 2 to 16, I am talking about.

Mr. Bennett: You can strike my question.

Q. (By Mr. Reilly): Will you refer to these Exhibits 2 through 16 now, Mr. Unterberger, and tell the Examiner what they show, please?

A. Mr. Examiner, the Air Line Pilots Association asked me to review the available statistical materials to determine what light they might throw upon this basic question you ask: Whether any of the employees of Western Air Lines had been adversely affected as a consequence of the transfer of Route 68 and certain physical properties to United Air Lines.

I have, as you have seen, derived a great part from sources there which are freely available to the C.A.B., and placed them in such a way as I think provide certain illumination to that problem.

By way of introduction—a very short one, let me assure—I operated with this basic assumption: That the job of an air line pilot is essentially that of operating a piece of aircraft a certain number of miles or a certain number of hours. That constitutes his job essentially. Hence, it follows from that that the employment opportunities on a specific air line are in turn determined by the number [2252] of aircraft-miles available to fly, the number of aircraft-hours available to operate the air line.

Starting from that point the first thing we have here, Exhibit No. 2, presents a tabulation of the

(Testimony of S. Herbert Unterberger.)

number of aircraft-miles flown on Western Air Lines, and it shows it both in terms of the total number of aircraft-miles and the total number of revenue aircraft-miles.

In reviewing that exhibit, it might be significant to start our consideration around the period where the transfer of Route 68 occurred. That takes us down—the transfer, of course, specifically occurred September 15. These data are monthly. The month of September is a very confused situation, because in part of that month Western Air Lines was operating Route 68, and in another part of the month it was not.

However, if we go back a couple of months from there and look at the first column, entitled "Total Number of Aircraft-Miles," on Exhibit No. 2, we find that in the early part of that year the total number of aircraft-miles operated by Western Air Lines over their entire system was in the neighborhood of, oh, it was in excess of 600,000. In the neighborhood of 625,000, let us say. Actually, it arose to such high points as 741,000 in July and 745,000 in August.

Now, we follow along and find immediately after the transfer of Route 68 in September a very dramatic decline, a decline down to 537,000 in October. As a matter of fact, it continued to decline lower and lower. In January, 1948, it was down to 492,000. In February, 1948, it was down to 484,000. That might not be so different. It is a three-day shorter month. [2253]

(Testimony of S. Herbert Unterberger.)

The conclusion is inescapable, of course, that at least chronologically prior to the operation of Route 68 this air line was operating substantially larger, great number of aircraft-miles than subsequent thereto.

Now, there might be a variety of explanations for that. There was some talk of seasonality here yesterday. That would happen toward the end of the year. To avoid the problem of seasonality, therefore, and to make an adequate comparison of what the total number of aircraft-miles available to fly on this air line were, before Route 68 was transferred and after Route 68 was transferred, it might be well to take—I have taken, as a matter of fact, for purposes of comparison, a six months' period running February through July of 1947.

Now, to anticipate my story a little bit, it is important to recognize why I chose that particular six months' period.

It will be remembered that yesterday there was some discussion about the number of schedules that were flown, and it was clear there that this air line had stabilized its operation over Route 68 at approximately four schedules a month during that period. It had wandered around ahead of that point, and had declined substantially subsequent to that point. But during that period we had a relatively stable situation. So that if we compare the operation of total number of aircraft-miles in a six months' period, February through July, 1947, with the same six months' period, February through

(Testimony of S. Herbert Unterberger.)

July, 1948, we find that there is a net decline of 14 per cent in the total number of aircraft-miles flown. [2254]

Thus, subsequent to the transfer of Route 68 this air line was essentially 14 per cent smaller in terms of its operation than it was prior.

When an air line shrinks in size—to go back to our basic proposition, when the number of aircraft is changed, the number of employment opportunities must fall. There is no other result that can accrue.

Here we find a decline of 14 per cent in the size of this air line. Hence, we must find a decline in terms of employment opportunities available on this air line, and from which the conclusion follows, of course, that there was a decline in the employment opportunities to a given number of pilots, the pilots that are adversely affected.

I have also put on this table the number of aircraft revenue-miles. As a matter of fact, that throws some illumination on another point that was being discussed here yesterday.

While the pattern which I have indicated in terms of total number of aircraft-miles is in greater part reproduced in the number of revenue aircraft-miles, that is, there is a substantial decline in the number of revenue aircraft-miles immediately subsequent to the transfer of Route 68, and in the long run subsequent to the transfer of Route 68. That is, if we use 1948 and compare the same six months' period we find that there was a decline not of 14 per cent

(Testimony of S. Herbert Unterberger.)

in the number of miles, but when one deals with the number of aircraft-miles there was a decline of 16 per cent.

However, there is a little more that I think that we can derive from from a comparison between total aircraft-miles and [2255] revenue aircraft-miles.

For this purpose I regret that the mathematics was not all completely done, but we can do it very quickly. For this purpose, if we go back to 1946 and compare for the month of June revenue aircraft-miles and total aircraft-miles we find that revenue aircraft-miles are 82,000 below total aircraft-miles.

In the next month they are 72,000 below. In the next month they are 32,000 below.

In other words, there were 82,000 aircraft-miles flown non-revenue. Now, there are a variety of reasons why miles are flown non-revenue. These are certainly not the kind of miles that an air line would prefer to fly.

There are always some standard reasons for that. Most of them, as I understand it, surround the problem of training pilots—getting them qualified. However, 82,000 in comparison to 699,000 is a large number of non-revenue aircraft-miles.

Now, let us take the same months in 1947 and see what the story is. In July, 1947, we find the difference between total aircraft-miles and revenue aircraft-miles is only 22,000. That as compared to

(Testimony of S. Herbert Unterberger.)

82,000 the year before. In August we find that the difference between revenue aircraft-miles and total aircraft-miles is only 12,000 as compared with 72,000 the year before. In September the difference is 25,000 as compared with 32,000 the year before.

I think it should be pointed out here that in 1946 there was a training problem. That was the year in which Route 68 was being introduced. That was the year when pilots were [2256] qualifying on new routes, and on new equipment.

In 1947 there was not that problem. Hence, we find that that is one of the important reasons for the decline in non-revenue aircraft-miles.

We come now to 1948. We find that to be awfully interesting. We find in June of 1948 there was only a difference of 30,000 non-revenue aircraft-miles. In July, however, it became 80,000. In August it became 70,000—back to the kind of non-revenue aircraft-mile situation that one found back in 1946.

Now, there are many reasons for that, but one of them suggests itself very strongly, which is that that was the year in which this company was introducing Convair equipment, and a great number of aircraft-miles were flown in the training of pilots on that new kind of equipment.

Now, I think this suggests to me an item of some significance, and that is that there is without a doubt an ebb and flow in terms of the employment opportunity on most of the air lines, and on this one specifically. There is a seasonality problem. There

(Testimony of S. Herbert Unterberger.)

is a cut-back in schedules, an amplification of schedules and a cut-back in schedules, and certain pilot employment opportunities are added and subtracted. But that is not apparently the only reason for adding and subtracting employment opportunity.

Pilot employment opportunities were added in 1946 for an operational reason—the extension of Route 68. That was one of the important reasons.

So that the decline in pilot opportunities, the lay-offs in October, towards the end of 1946, are in part, and perhaps [2257] a substantial part, due not to cut-backs at all, but, rather, to the fact that Route 68 was running and operating efficiently.

Even more important, however, is 1948 where there was a cut-back, a so-called seasonal—allegedly seasonal decline in the fall of 1948. And no doubt there was some seasonal decline in the fall of 1948. However, these statistics suggest—this very large increase in non-revenue hours—suggests that there was another reason, and a very important one, and that is that the Convair training program was over and hence we no longer needed pilots to operate the route and be trained on the route. We only needed one set of pilots to operate the route once they were trained. So that the cut-backs in 1948, these statistics suggest that the cut-backs in 1948 were not of the same order, not the same breed of task entirely as the cut-backs in 1948. It was not just in the normal operation of the air lines, just the usual thing that happens, the calamity that occurs every

(Testimony of S. Herbert Unterberger.)

fall; but at least there was some other thing that occurred. They got rid of all of these non-revenue aircraft-miles. And statistics show that they were a sizable number.

So that we find two things as a result of our analysis of Exhibit No. 2. We find, firstly, that this was a declining air line after the elimination of Route 68. We find it shrank 14 or 16 per cent, somewhere in that neighborhood. We find in addition that the pattern of employment, the seasonal pattern of employment—rise in the spring and decline in the fall—while it repeats itself to some extent, is significantly different from year to year, and is attributable to [2258] different reasons. We find, of course, that the pilots were adversely affected because the air line is a smaller air line.

Now, if I may, I would like to turn to Exhibit No. 3. It will be remembered that I set down as a basic proposition at the beginning, my own basic proposition, that is, that the job of a pilot can be measured both in terms of the number of miles and the number of hours that he operates aircraft.

As a matter of fact, the number of hours is of special importance because there is a legal limitation and the number of hours that are available sets the upper limit within—let's put it the other way: The number of hours really sets the lower limit on the number of pilots you can use. In other words, if you are running 86 hours, the legal limit for the number of pilots you can use is two. And so it goes. Eighty-five hours is the maximum num-

(Testimony of S. Herbert Unterberger.)

ber of hours you can use one pilot. So to be sure the number of hours limits the number of pilot employment opportunities.

Now, may I make one point parenthetically before we turn to Exhibit No. 3. That is, in discussing the exchange of this air line, I now turn to the consideration of 1949 data which were not on the exhibits as originally submitted. I was asked, and I actually asked for the privilege of adding to these exhibits to bring them up to date.

It will be remembered that when the exhibits were filed initially they were filed many, many months ago. I feel somewhat frustrated in having more current detail and not being able to use it.

Examiner Wrenn: Is that the only difference between the [2259] exhibits originally distributed and the ones you just submitted? The 1949 data is added?

The Witness: That is right.

Q. (By Mr. Bennett): As a matter of fact, the ones you submitted yesterday are identical down to that date; is that correct?

A. Yes. For your information, they are the old exhibit with this tacked on.

Examiner Wrenn: All right.

The Witness: If we go into 1949, one finds that the Western Air Lines shrank a little further. The total again, using my basic comparison of February to July, remembering that the Civil Aeronautics data I cannot get much closer—I can get through September—well, I can get through August. I am

(Testimony of S. Herbert Unterberger.)

told that the September reports are somewhere in the house. They are not accessible to me.

However, if we use February through July again, we find this air line shrank a little further. 1949, the same six months' period, the total number of aircraft-miles was 18 per cent below what it was in 1947 when Route 68 was operated. The number of revenue aircraft-miles was 19 per cent below what it was in the same six months' period in 1947 when Route 68 was operated.

Now, if I may, I would like to turn to Exhibit No. 3, the number of aircraft-hours.

Here, too, we take as our point of reference September, 1947, and we will see that in that month 3,614 hours and six minutes were flown in United Air Lines. We start at that point and go [2260] back——

Mr. Reilly: What air line?

The Witness: Western Air Lines, I am sorry.

If we start at that point and go back, we find that the number of aircraft-hours approximated, averaged, about 3,700, I would say. Immediately thereafter there were substantial drops, 3,200, 3,100, 3,200, 2,900. The pattern is not essentially different. There is a slight difference in magnitude. The pattern is almost identical.

Again, let us compare the six months' period in 1947—the period of relative stability under the operation of Route 68. February through July, as compared to the same period in 1948, what do we find? We find the same thing, same conclusion

(Testimony of S. Herbert Unterberger.)

reinforcing it. A decline of aircraft-hours of 12 per cent, revenue aircraft-hours of 14 per cent.

In 1949 there were further drops, a decline in total aircraft-hours of 15 per cent below 1947 and revenue aircraft-hours of 25 per cent.

So that again we find that even using the measure of aircraft-hours there is a substantial shrinkage of the air line; that aircraft-hours which determine the employment opportunities, minimum employment opportunities, are down. They are down 12 to perhaps as much as 25 per cent, depending on what measure you use. It is relatively unimportant as to what measure you use. They all show that they are down by significant proportions.

That is the principal conclusion that one draws from analyzing the number of aircraft-hours. It reinforces the conclsuion in terms of aircraft-miles. It is perhaps more conclusive in terms of demonstrating the decline in employment [2261] opportunities, and the consequent adverse effect on pilots.

May we turn to Exhibit 4. Exhibit 4 shows that the number of passenger-miles flown over Western routes. Now, the reason for going into the question of passenger-miles is that while initially the number of aircraft-miles and number of aircraft-hours determines the number of employment opportunities, in the last analysis it is relatively the number of passengers carried, and business done over those routes, that determines whether those employment opportunities will persist.

Many air lines have operated that number of

(Testimony of S. Herbert Unterberger.)

aircraft-miles and passenger-miles for a short period of time; I doubt that any of them can do that very long.

Now, when we look at passenger-miles we find again, if we start in September of 1948 and look before that point, we find that the company was averaging, oh, 16,000 or 17,000 passenger-miles——

Q. (By Mr. Bennett): You mean 1946?

A. 1947. Beginning in 1947.

Immediately thereafter there was an inescapable decline. It dropped from 19 down to around 8, 8½—8,500,000 passenger-miles. In other words, there was a drop here of about almost 50 per cent in passenger-miles, in amount of business done.

Let's take April of 1947 where the number was 16.2 million. Let's take April of 1948 where the number was 8.8 million.

As a matter of fact, if we use again this six months' [2262] period which I have used for the purpose of reference throughout here, we find between 1947 and 1948 a decline of 40 per cent in the number of passenger-miles. In the number of revenue passenger-miles we find a decline of 41 per cent.

So that we have the situation here where not only did this air line shrink in size in terms of number of miles and number of hours, but it shrank even more substantially in terms of the amount of business it was doing, the amount of business which ultimately has to support the pilot employment, and, for that matter, total employment.

(Testimony of S. Herbert Unterberger.)

There can be little doubt that when an air line drops 40 per cent of its business after the transfer of one of its routes that its pilots are adversely affected.

We turn now to Exhibit No. 5, which shows the available seat-miles operated over Western Air Lines. I will summarize that one very quickly. By and large it demonstrates the same pattern. It demonstrates a significant decline after the transfer of Route 68—a decline that still persists. There was a decline of 32 per cent between the six months' period 1947 and 1948, and even the 1949 after Western Air Lines added to its equipment in some measure by the Convair program there was still in terms of available seat-miles 26 per cent less in that six months' period than there was in the same six months' period when it was running Route 68.

Now, I have used each of the available measures in terms of the total situation at Western Air Lines, and it might be said that this was somewhat redundant. They all proved the same thing. That is true, they all demonstrate approximately the same thing in varying degrees. The importance, of course, [2263] of using each of the measures are two: One of them is thereby one avoids any charge of selecting his measure. These are all there are, really, in terms of the available statistics. Secondly, they reinforce, at least to my mind, the conclusion. Regardless of which measure is used, the answer is the same. No one of them, no operational reason which could have affected one of them is selected

(Testimony of S. Herbert Unterberger.)

out and a conclusion drawn, but the operational reasons are allowed to affect all of them. And the inescapable conclusion follows, being that it is a smaller air line.

Now, not only is it a smaller air line but it is a slightly different air line.

In connection with the transfer of Route 68 not only was the route itself disposed of, but four aircraft, four sizable aircraft, the largest aircraft the company had, were disposed of, together with the route.

Examiner Wrenn: Didn't Western Air Lines concede originally that it was going to be a different air line and a smaller air line? Wasn't that the whole theory urged in this whole case?

Mr. Renda: That is not in issue here, Mr. Examiner. I agree with you.

The Witness: I take it you want my comment on that point.

Examiner Wrenn: No. I just fail to see where that issue is here, because, as I get it, your testimony here demonstrates what Mr. Drinkwater said back in May, 1947, was going to happen.

The Witness: Well, if I may, I will make one observation [2264] on that point. That is, that from my understanding of what Mr. Drinkwater said, he said something about their being a smaller air line. He, however, was quite specific about saying that there would be no lack of employment opportunities. We are getting to that point.

Examiner Wrenn: I don't disagree with you on that point.

(Testimony of S. Herbert Unterberger.)

The Witness: We are getting to that point. However, we have been demonstrating several things—exactly what kind of a smaller air line it is, and——

Examiner Wrenn: Well, my remark was really directed to your point there that you came to the conclusion that it was a smaller air line. I couldn't see there was any issue on it.

Is this a good point to stop for lunch?

Mr. Bennett: Yes.

Examiner Wrenn: All right, we will recess until 2:00 o'clock.

(Whereupon, at 12:35 p.m., a recess was taken until 2:00 p.m. of the same day.) [2265]

Afternoon Session—2:00 P.M.

Examiner Wrenn: All right, gentlemen, let us continue.

Whereupon,

S. HERBERT UNTERBERGER

resumed the witness stand, and was examined and testified as follows:

Direct Examination
(Continued)

By Mr. Bennett:

Q. All right, Mr. Unterberger.

A. Just before we stopped for lunch, Mr. Examiner, you raised a question. I have thought about

(Testimony of S. Herbert Unterberger.)

it a little while and I would like to amplify my answer.

Examiner Wrenn: Go ahead.

The Witness: The basic question was whether I wasn't saying pretty much the same thing that has been admitted, that this is now a smaller air line.

I think in general there may be some confusion in regard to the use of the word "smaller." As I understand the testimony previously stated to this Board, the word "smaller" refers to a smaller number of miles. It does not cover as many route-miles as it used to. I am also led to believe that it is smaller as related to employment opportunities. As a matter of fact, the burden of the exhibits I have discussed and analyzed so far are in the measure of employment opportunities, and the things that measure employment opportunities, namely, miles and hours as significant to a smaller air line.

Now, turning to Exhibit No. 6. Exhibit 6 shows the number of revenue aircraft-miles flown by type of aircraft, and [2266] the three principal groups operated in this air line are DC-3's, DC-4's, and, more recently, the Convair 240.

Here, if you will, let us observe specifically the column headed "DC-4 Passenger." That shows the number of passenger revenue aircraft-miles flown by DC-4's. They, of course, are the kind of ships that were flown on Route 68.

Now, here we find isolated, narrowed down, some of the principal effects of the transfer of Route 68. Again starting with our point of reference Septem-

(Testimony of S. Herbert Unterberger.)

ber, 1947, and going back from that point, we find that the volume of revenue aircraft-miles flown on DC-4's is up in the neighborhood of 380,000 per month. Immediately thereafter, and immediately after the transfer, the decline is very substantially, falling consistently since then — not necessarily month by month. There is a consistent trend downward since then.

A comparison of the six months that we have been using for reference in 1947 to the same six months of 1948 of DC-4 aircraft indicates a decline of 44 per cent from 1947 to 1948. If we go to 1949 we will see that much fewer miles were flown in DC-4 aircraft. More of them, of course, were sold off. The decline there is 83 per cent below 1947.

This, of course, comes as no surprise, since together with the transfer of Route 68 a significant proportion of the total number of DC-4 aircraft owned by the company were transferred as well.

The principal significance from the standpoint of the adverse effect on the pilots is that the remuneration in the flying of DC-4 aircraft was higher than the flying of any other type of aircraft on that line, on Western Air Lines, at [2267] the time of the transfer, and I am told since, although the remuneration on Convairs is apparently very close to it now. So that we find in the transfer of Route 68 not only did the pilots lose all of the things we are talking about so far in terms of employment opportunities, but the jobs that were left to them were in great part jobs that paid much less. They were flying

(Testimony of S. Herbert Unterberger.)

much less remunerative aircraft, thus less employment opportunities. But the jobs that were left were not as good as the jobs they previously had. And that persists until this day.

If we may turn now to Exhibit 7, we find that the same kind of distribution, that is, the number of aircraft—we show the number of aircraft hours by type of aircraft. Now, by and large the conclusions drawn from this are the same, and that is that the volume of DC-4 flying declined precipitiously, and is continuing to this day to be declining. The decline in hours, as a matter of fact, exceeds the decline in miles. The decline in hours from the six months' period of 1947 to the same period of 1948 approximates 58 per cent. Let me check these figures.

I am sorry, that is not correct. I have looked at the wrong date there.

The decline in hours is slightly less than the decline in miles. The decline in hours is only 41 per cent. The decline in miles is 44 per cent.

However, the decline of 41 per cent—the differences are not significant. The difference between 41 and 44 is not very great. The important point is, of course, that the flying of DC-4 aircraft fell by well over one-third. [2268]

The same conclusion, of course—the adverse effect on the pilots in terms of their opportunity to fly larger and more remunerative aircraft.

Exhibit 8 demonstrates essentially the same con-

(Testimony of S. Herbert Unterberger.)

clusion, but reinforces it with respect to passenger-miles.

Now, there, there is a much greater decline in terms of passenger-miles on DC-4 aircraft. A decline for the six months' period in 1947 to the six months' period in 1948 was 58 per cent. More than half the DC-4 business—more than half the DC-4 business no longer existed after the transfer of this route.

Exhibit 9 we will turn to now. Exhibit 9 goes to a point that has been considered several times. It will be remembered that representations were made to this Board that all or most of the lost employment opportunities on the Los Angeles-Denver route would be picked up by the extension of the San Francisco-to-Seattle route. The facts on that, the data on that, are shown on Exhibit 9.

On Exhibit 9 we will see that the Los Angeles-Denver route in 1947, let us say, was operating between five and seven million revenue passenger-miles a month. That is, prior to August.

Now, the so-called substitute route from the standpoint of employment opportunity, the San Francisco-to-Seattle route in August started out with 3,800,000 revenue passenger-miles. That is significantly below the number of revenue passenger-miles flown on Route 68 any month subsequent to almost its inception, not quite.

Go back to June, 1946. In the months of April and May [2269] Route 68 was hardly operating at full capacity. As a matter of fact, as I understand it, the airplanes were not available.

(Testimony of S. Herbert Unterberger.)

Now, I will take one little hedge on that. The month of February is a little bit below on Route 68 the month of February on Route 63. But it must be remembered that the month of February is three days shorter than August.

However, the level attained the very first month in which the so-called substitute equivalent employment opportunity route was obtained was from thereon never attained. It dropped in September to 2.9; October, 1.9; November, 1.9; 2.7, 1.9, 1.8, 2.0, and it is still right down here in 1949 at the bottom of that table operating at a level substantially less than half what Route 68 was operating at when Western was operating Route 68.

The obvious conclusion, of course, is that the San Francisco-Seattle route which was supposed to offer the equavilent employment opportunities never even offered them at the beginning, and since then has been less and less adequate in terms of offering employment opportunities.

To tie this down to specific comparisons, the Route 63, San Francisco-to-Seattle, in terms of the revenue passenger-miles, fell 61 per cent below the Los Angeles-Denver route, using the same six months' periods for comparison, in 1948; and fell 65 per cent below in 1949.

By now it is not even one-third as good. The San Francisco-Seattle route is not even one-third as good as Route 68 was in 1947.

Incidentally, it might be observed in passing, that

(Testimony of S. Herbert Unterberger.)

some [2270] of the other routes of national air lines are not as good.

Mr. Renda: You mean Western.

The Witness: Western Air Lines.

Mr. Bennett: Let the record so show.

Examiner Wrenn: That seemed to me to be an unnecessary lot of noise about an obvious slip of the tongue.

Go ahead.

The Witness: The drop in other routes was significantly smaller—there was some drop, to be sure —than the drop that resulted from the transfer of Route 68 and the substitute, or so-called substitute, of Route 63.

Exhibit 10 directs itself to this question: To be sure, Western Air Lines is an air line which is now operating at a significantly lower level than it did in 1947. But are not all air lines operating at a significantly lower level, and is this phenomena peculiar to Western Air Lines? If all are operating at that same level, obviously the problem on Western is a more universal problem.

Hence, we have on Exhibit 10 in the very first column the number of revenue passenger-miles carried by all the domestic air mail carriers. These data are derived from the recurrent reports of mileage and traffic prepared by the Civil Aeronautics Board.

What do we find there in terms of all air line carriers in the United States, including Western? Well, if we start with our point of September, 1947,

(Testimony of S. Herbert Unterberger.)

we find prior to that point that all air line carriers were operating in the neighborhood of, let us say, 500,000,000 revenue passenger-miles. Subsequent, in the next year, there is not very much [2271] difference. On the average it comes out about the same.

Let us tie that down. Using the same six months' period which we have used all through here for comparison, we find that in terms of revenue passenger-miles there is a decline of but 3 per cent from 1947 to 1948 for all domestic air mail carriers. This is to be compared with a decline of 41 per cent on Western for the same period.

By 1949, using the same six months' period for comparison, there is an increase of 13 per cent for all domestic air mail carriers. This is to be compared with a decline on Western by 1949 of 42 per cent.

Thus we have the conclusion that a situation on Western is almost diametrically opposed to the situation that is found on all air mail carriers. The total domestic aircraft industry, at least as measured by revenue passenger-miles, either held its own in 1948 or almost its own, or increased. Thus employment opportunities, as a whole, as measured by this, held their own pretty well. On Western there was a drop of in excess of 40 per cent—using the same measure.

Turning to Exhibit No. 11, the same comparison is made in terms of available seat-miles. There we find that—again using the same six months—between 1947 and 1948 there was an increase of 10

(Testimony of S. Herbert Unterberger.)

per cent in available seat-miles, and by 1949 an increase of 27 per cent. This is to be compared with the same data in the next column, which reflects the situation of Western, showing a decline of 32 per cent by 1948, and a somewhat smaller decline of only 26 per cent by 1949.

However, the situation, if we use available seat-miles as the criterion, is while Western fell off 27 per cent the [2272] total air lines of the United States increased 26 per cent.

These data, I think, also go specifically to the point of the adverse effect on Western's pilots of the transfer of Route 68. That was a principal phenomena that occurred on Western's lines during those periods.

Now, the next question I asked myself in making this analysis was: Well, if Western fell off substantially, and the plea here is to transfer pilots, what was the situation on United? Did United fall off as much? Was there room for absorption of these pilots on United? Hence, in Exhibit 12 I have attempted to compare the situation on Western with the situation on United.

Now, we know what the situation on Western is—a substantial decline. What was the situation on United?

If you look at Exhibit No. 12 where the revenue aircraft-miles flown by each system are shown, we find that there apparently was between 1947 and 1948 roughly the revenue-miles were about the same on United. As a matter of fact, the precise com-

(Testimony of S. Herbert Unterberger.)

parisons for the same six months' period shows there might have been as much as a one per cent increase on United. There was no decline, certainly. There was some increase, part of which might have been attributed to the fact that they incorporated Route 68 into their system.

The effect on Western, Western being a smaller line, losing a substantial leg of its system, was very substantial, as we have seen. The effect on United, which is one of the giant lines, adding to its system doesn't add too much percentagewise.

By 1949, to complete the picture, United's [2273] revenue aircraft-miles did fall somewhat. They are down by my calculation 7 per cent.

However, even the latter decline on United in no way compares to the substantial declines on Western. Initially, however, there was no decline on Western. Quite the opposite, there was an increase.

I will deal rapidly with Exhibits 13, 14 and 15, and make essentially the same comparisons, using each of the other measures we have become familiar with in the past. The conclusions there are substantially the same. Slight differences in the percentages, but by and large the conclusions are the same.

In terms of seat-miles, United added substantially to its seat mileage. It no doubt added larger aircraft during that period, which is likely to be what accounts for it.

We pass now to Exhibit 16. Exhibit 16 goes to this same question—the question of whether the pilots who had been operating Route 68 on Western

(Testimony of S. Herbert Unterberger.)

Air Lines could have been absorbed directly by the operations of United after it took the route over. And it goes to the question quite directly. The past three or four exhibits went to it via the overall figures. This goes to it by pin-pointing the specific route, Route 68. And as I read that table, here is what it shows:

We start at the very top of the table, in the very first column, when Western Air Lines had the Denver-Los Angeles route. It started out very modestly, with one schedule a day. It built that up over the months to a maximum of six schedules a day, as reported in the Official Air Lines Guide. That dropped somewhat until by February they were operating [2274] four schedules a day, and apparently had stabilized from there on out at four schedules a day. The initial period appears to be a period of experimentation to see how much traffic the route could support, and by February it appears that the experimentation period was pretty much over and there was a stability introduced. That stability was only upset in August when the air line transferred off of that route two of its aircraft.

The situation in September is really only reflective of a couple of weeks that the air line operated this route in September.

So that we find that after a period of initial experimentation this route was stabilized at about four trips a day.

When United took over the route they, too, apparently went through a period of experimentation to

(Testimony of S. Herbert Unterberger.)

see how much traffic the route would carry, and started out with six trips a day. Four trips Denver to Los Angeles, and included as well the Chicago-Los Angeles non-stop and the New York-to-Los Angeles with an operational stop. Thereafter, they operated eight trips a day, four and one directly from Denver to Los Angeles and the others over the more extensive route.

They apparently stabilized for a while at five trips a day, but by 1949 they were back up to six and seven.

Through most of this period, through 14 of the 24 months, roughly, that are represented here—25 months—United Air Lines *Air Lines* operated as many trips over Route 68, specifically Route 68, Denver to Los Angeles, as Western had operated over that route when their situation was [2275] stabilized. Apparently there was that much employment offered by the route. The route offered by Western offered just as much employment—the route as operated by United offered just as much employment as the route as operated by Western.

Now, if we also consider the fact that United was running non-stop from Chicago, the argument might be made out that it offered more employment. It is not necessary to make that argument. It is only necessary to point out that the route now, from the standpoint of employment of pilots, offered the same employment opportunities as when Western operated the route.

It seems likely that there would have been no

(Testimony of S. Herbert Unterberger.)

difficulty, on the basis of this evidence, if the pilots had gone with the route.

Now, in the subsequent presentation there is also an Exhibit 17. Exhibit 17 is a summary of the comparison of the six months' period I have referred to as we have gone along. It is based entirely on the accumulation of the data in the preceding exhibit. It was not submitted initially. However, I describe it to this extent, that it is the same data summarized for that six months' period and percentages shown for a simple quick glance at the total situation. And, if I may, I would like to make really just one observation about it: That is, if we look down as far as line 24 on that exhibit, all of those data reflect the situation on Western Air Lines, and we will find that the predominant changes from 1946 to 1948 are predominantly downward changes with substantial magnitude. The changes deal with 1947 in the operation of DC-3 aircraft where there was a slight increase—leave out the [2276] word "slight"—there was an increase in miles, increase in operations.

The plusses, of course, are found elsewhere. The plusses are found with respect to the total aircraft system of the United States, and the operation of United Air Lines.

Mr. Examiner, I believe that completes my analysis of these data.

Mr. Bennett: In order to keep our exhibits straight, may I have this marked for identification as A.L.P.A. Exhibit 17-A?

(Testimony of S. Herbert Unterberger.)

Examiner Wrenn: All right. That is the summary sheet to which the witness has just referred.

Mr. Bennett: Yes.

Examiner Wrenn: All right, that will be marked Exhibit 17-A.

(The document referred to was marked for identification as A.L.P.A. 17-A.)

Mr. Renda: Mr. Examiner, so that there can be no mistake as to Western's position at the time these data are offered in evidence on behalf of A.L.P.A., I want to put the Examiner on notice at this time that I propose to move that all data and all testimony dealing with 1949 not be received in evidence. It was submitted to us in late time and we have had no opportunity to analyze it, check it, and prepare cross-examination on it.

I will renew that motion at the appropriate time.

Examiner Wrenn: All right.

Q. (By Mr. Bennett): Mr. Unterberger, I show you Exhibit 18, for [2277] identification, and I ask you to state if you also prepared that exhibit for filing in this cause?

A. Yes. These are excerpts from a longer report which I prepared. I am prepared to sponsor this exhibit.

Q. And in the preparation of this Exhibit 18 you made a study of the Burlington formula, did you not? A. Yes.

Q. And you are now prepared to sponsor this exhibit? A. Yes.

Q. And to be cross-examined upon any of its contents? A. Yes.

(Testimony of S. Herbert Unterberger.)

Mr. Bennett: You may cross-examine.

Examiner Wrenn: Mr. Crawford, do you have any questions of the witness?

Mr. Crawford: Yes. I would like to ask the witness a few questions in order that I may understand the theory back of this exhibit.

Mr. Bennett: Which exhibit is that?

Mr. Crawford: Exhibit No. 18. [2278]

Cross-Examination

By Mr. Crawford:

Q. This is captioned "The inapplicability of the Burlington Formula to the current air line situation."

Now, do I understand that to mean that your theory of this Exhibit 18, that the Burlington Formula would not be applicable, do you mean that it would not be applicable to all employees other than the pilots, or are you just referring here to the pilots?

A. You are entirely correct. This exhibit reflects the situation with respect to pilots entirely. I have not investigated the situation as it might apply to non-pilot employees.

Q. Then it is clearly understood that your reference all through the document, where you say the Burlington Formula—on page 4, now, Mr. Unterberger, you have this caption: "Why the Burlington Formula is totally inapplicable to the current air line situation." Now, I assume in your reply

(Testimony of S. Herbert Unterberger.)

wherever you reply to the inapplicability to the air line situation, you are limiting that to the pilots?

A. Yes, that is correct.

Q. Then it is not your intention to say, or you cannot at this say, that the Burlington Formula would not be applicable to the other employees, to this Board?

A. No, I have not investigated it.

Mr. Crawford: That is all.

Examiner Wrenn: Mr. Renda, you may cross-examine the witness. [2279]

Q. (By Mr. Renda): When were you employed by Air Line Pilots Association to undertake this study, Mr. Unterberger?

A. Air Line Pilots Association has been a client of mine now for several years. Your question—let me clarify your question more specifically. Are you referring to Exhibits 2 through 16, or Exhibit No. 18?

Q. When were you first asked to undertake the study which you have testified to in its entirety?

A. To the best of my recollection, my original conference with respect to a study of the Burlington Formula, and its applicability to the air line situation, and to the situation of the air line pilots, shall I say, was initially discussed with me around the end of last year. Perhaps there is a date here.

It was initially discussed with me and the research work was done on it around the end of last year and the beginning of this. I don't know now

(Testimony of S. Herbert Unterberger.)

exactly the date I made the complete study of the pilots——

Q. I didn't ask you just about Exhibits 17 or 18——

A. I haven't finished my reply.

Q. I asked about the whole thing.

Examiner Wrenn: Go ahead, Mr. Unterberger.

The Witness: Exhibits 2 through 17 were prepared—the original conference on them would be early this year some time. They were prepared immediately prior to their submission, and my guess is—I don't now remember the date of the submission—March or April, thereabouts, in the spring of the year, and they were prepared roughly in the four or five weeks' period preceding that submission. [2280]

Let me put it another way: They were prepared at the time—I don't have my office records to give the exact date, but they were prepared at the time of the last available data filed with the Civil Aeronautics Board, which was for September, 1948.

Q. (By Mr. Renda): The letter of transmittal indicates these were filed with the Board June 7, 1949. Is it your brief answer that they were prepared on or about that time?

A. No, sir. My answer is precisely as stated. They were prepared prior to that time——

Q. All right. We won't have to review it again.

Are you retained by Air Line Pilots Association, or are you their employee?

A. They are clients of mine.

(Testimony of S. Herbert Unterberger.)

Q. And how long have you had A.L.P.A. as a client of yours?

A. Roughly, since early in 1948, perhaps earlier than that.

Q. Do you specialize in research work for air lines? A. No, sir.

Q. Have you ever undertaken any study for any scheduled air carrier in the United States with respect to their operations, traffic and cost?

A. No, sir. But may I give a broader explanation of my answer: The Labor Relations Information Bureau has as its clients both employer and employee groups. As a matter of basic policy, however, we never have an employer and employee group in the same industry. Having accepted the Air Line [2281] Pilots Association as a client, we would not accept any air line as a client.

Q. Unless the air line was able to pay more than the Air Line Pilots Association, of course.

A. I resent that, sir.

Mr. Bennett: I object to that and ask that it be stricken.

Examiner Wrenn: Strike it.

Q. (By Mr. Renda): You have given us a lot of data that seems to indicate you made a thorough and complete study of Western's system, and you sure know what is wrong with Western. How many airplanes did Western own in 1947?

A. I do not have those data here.

Q. Do you have them with you?

A. No, sir.

(Testimony of S. Herbert Unterberger.)

Q. Do you know? A. I can find out.

Q. You don't know at this time.

How many airplanes did they own in 1946?

A. I do not now have data with me or in my memory as to the precise number of airplanes Western owned at any time.

Q. How many route-miles did Western operate in 1946?

A. I do not have those data with me now. I do not know how many they were at any time, offhand.

Q. How many route-miles were they certificated for in 1946?

A. I do not have available with me now, nor am I prepared to state out of my memory, any data with respect to [2282] Western Air Lines that are not shown on these exhibits.

Q. Now, you testified at great length as to all these various data contained in these Exhibits 2 to 17, and I have never seen so many figures, and I think you have done a pretty good job of recitation, and it seems obvious that——

Mr. Bennett: Mr. Examiner, I object to him arguing with the witness. If he has a question, I suggest that he ask it.

Mr. Renda: You will get more questions——

Examiner Wrenn: All right, let's not argue. Finish your question.

Q. (By Mr. Renda): Do you know how many miles Western was certificated to operate in 1947?

A. I stated in my answer to the previous question that insofar as data not covered by these

(Testimony of S. Herbert Unterberger.)

exhibits, I am not prepared to draw them out of my memory. I do not know them without reference to the available statistical data. I would not have known these data without reference to the sources.

Q. Now, you knew you were going to be subjected to cross-examination on these exhibits and these data, did you not? A. Yes, sir.

Q. So you came unprepared.

A. No, sir.

Mr. Bennett: I object to that.

Mr. Renda: Mr. Examiner, this is entirely proper. This man has submitted a lot of data here, and I want to know what he knows about [2283] this.

Examiner Wrenn: You can test him. But your characterization as to his preparedness or unpreparedness is your own. You don't expect the witness to agree with that.

Mr. Renda: I agree.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): Do you know what Western's net operating loss or profit was in 1946?

A. My last answer I will repeat: Insofar as statistical data with respect to Western Air Lines is concerned, I am not prepared to provide them out of my memory. I am not even prepared to provide those data which are in my tables, out of memory. I refer to the tables. And when asked questions, I refer to the original data.

Q. Do you know what United's break-even mail pay was in 1947?

(Testimony of S. Herbert Unterberger.)

A. I refer you to my previous answer, sir.

Q. Do you know what their load factors were in 1946?

A. I refer you to my answer to the previous question.

Mr. Bennett: My suggestion to Mr. Renda is that in cross-examination we have put on a witness who introduced certain evidence into the record. Mr. Renda should confine his cross-examination to that. Obviously, this man wouldn't know and hasn't all that data with him. His cross-examination should confine itself to the direct, and I suggest that questions outside of that are not proper here.

Examiner Wrenn: I don't think the questions are necessarily outside of the direct. He is testing the capacity of the witness, and he intends, of course, to attack the testimony, [2284] presumably, on the theory that the witness is not qualified to analyze Western.

Mr. Bennett: You mean because he doesn't know the different things this man is questioning him about?

Examiner Wrenn: I presume that is what he has in mind. I am certainly not prepared to cut him off of that. That is his privilege.

Mr. Bennett: Is that what——

Mr. Renda: You can make your own assumptions.

Mr. Bennett: All right.

Q. (By Mr. Renda): On what date in 1946 did Western start its operation of Route 68?

(Testimony of S. Herbert Unterberger.)

A. That was in May of 1946, to the best of my knowledge.

Q. Do you know how many employees Western had on its pay roll in May, 1946?

A. Not without reference to the available information on that subject; no, sir.

Q. Do you know what the available ton-miles were that Western was flying in May, 1946?

A. Not without reference to the original data, no.

Q. Do you know what Western's mail pay was in May, 1946?

A. In doing a research job it is always essential to start out with basic data. One does not rely on one's memory for basic statistics. It is very unlikely that I or many other people could possibly have at command such statistics, and did I have them in my memory I would be loathe to [2285] recite them under oath for fear of making an error. That is not to say that I do have them. I do not have them. But in doing a careful research job I cannot rely upon my memory for those figures.

Q. Mr. Unterberger, let me ask you this question: In your opinion, Western Air Lines in 1946 was comparable in size to what carrier or groups of carriers?

A. I could not answer that question without researching into the field, first.

Q. You don't know whether Western Air Lines was a large carrier, small carrier, or medium-sized carrier?

(Testimony of S. Herbert Unterberger.)

A. I do know on the basis of the data here it was significantly smaller than United.

Q. Significantly smaller. How much?

Mr. Bennett: You mean percentage, or how many people? In what regard do you mean?

Mr. Renda: I don't know what he means. He will be subject to redirect.

Mr. Bennett: I submit the question is not complete.

Mr. Renda: Mr. Examiner, I will save you the difficulty of ruling on that.

Examiner Wrenn: It is perfectly all right; it would not be difficult. But go ahead.

Q. (By Mr. Renda): Comparing different carriers on an available ton-mile basis in 1946, can you tell me with which carrier Western would compare favorably in size?

A. I am not exactly sure by what you mean compare favorably. I think you mean [2286] compared.

Q. Compare the same.

A. Well, I wouldn't rely on memory for that, of course. I can tell you, of course.

Examiner Wrenn: Why don't you pick out one of the comparisons you have used there? Revenue-miles or aircraft-miles, or whatever test you used there.

Mr. Bennett: And do what with it?

Examiner Wrenn: Make whatever answer he wishes. He was asked the question in what way. I suggest that if he wants to answer, that he use as

(Testimony of S. Herbert Unterberger.)

a basis one of the elements of comparison he made back in his exhibits.

The Witness: I would be very happy to, Mr. Examiner, but the difficulty is I do not have similar accurate information with respect to other air lines. I only have it with United.

With respect to United, if we take revenue aircraft-miles, and we use the year of 1947, let us say, we find that United in that year was a line that was operating in the neighborhood of five million. Western in that year was a line operating in the neighborhood of six hundred thousand, which means that Western was a line about 12 per cent the size of United—using that measure.

We could use the other measures we have here, and I am sure they wouldn't come out very much different.

Examiner Wrenn: There is no need to go into that.

Q. (By Mr. Renda): Mr. Unterberger, that does not answer my question. You have in here made certain comparisons of Western Air Lines with all the domestic air mail carriers, and I want to know [2287] if you know from your own knowledge—your own study you claim to have made in this case—just what carrier Western is the same as in size on the basis of the available and ton-miles basis.

A. I have not compared Western with any other carrier. I have compared Western as—and I submit it is a legitimate comparison—with all of the

(Testimony of S. Herbert Unterberger.)

air mail carriers. The question I posed here, and the question these data are designed to answer, is how does Western compare with the rest of the air line systems in the United States.

Q. Do you think it is fair to compare Western with a transcontinental carrier?

A. I have not done that, sir.

Q. Do you think it is fair to compare Western to a group of carriers of which a transcontinental air line is a part?

A. I have taken all of the domestic carriers. I do think it is proper to compare Western with what the statistics call the universe. It is proper to compare any individual with the universe.

Q. Well, I am not interested in what the statistician thinks should be compared with the universe, or thinks is proper. We are trying to find out some facts here.

Let's go to 1947. In making the various conclusions that you have testified to with respect to the situation in 1947, did you give consideration to Western's size as compared with the so-called medium-sized carriers?

A. My comparisons are all right here. I did not compare Western with any other specific carrier except United. [2288]

Q. Isn't it a fact that the comparison you made presents the most favorable comparison for the testimony you have given?

A. As a fact of the matter, I did not know that, whether it is the most favorable or least favorable.

(Testimony of S. Herbert Unterberger.)

I have not made any other comparisons, and, hence, couldn't know it.

Q. Are you in any way familiar with Western's routes, the cities they serve?

A. Insofar as they are described in official documents. I know where they run. It is right here.

Q. Do you know what routes they were operating in 1947?

A. I only know the three principal ones. I have somewhere, I believe, a tabulation of the smaller routes. The three principal ones are shown on one of these exhibits.

Q. Western operates a route called—three routes called 52, 19, and 13. That is from Los Angeles up to Salt Lake City, on up to Great Falls, and to Lethbridge. Have you any idea just how heavy the traffic is on that particular route?

A. I know about from Salt Lake to Lethbridge.

Q. Is that a dense route, trafficwise?

A. What is your definition of dense route?

Q. Well, you answer it and then——

Mr. Bennett: Unless he understands it how can he answer it?

Q. (By Mr. Renda): You don't know?

A. I don't know what your definition of "dense" is. [2289]

Q. You don't understand my question?

A. No.

Q. Do you know what are the passenger revenue-miles that Western generated in 1947 between Salt Lake City and Great Falls on its Route 19?

(Testimony of S. Herbert Unterberger.)

A. They are not differentiated in my data here. They are in the so-called "Other Classification."

I might point out that those data to which you are now referring are not broken down on the reports to the Civil Aeronautics Board, else they would be. They are merged in the other classification in the C.A.B. reports.

Q. In your consideration of this problem, the preparation of these data, and the testimony you have given here, have you given any consideration to the problem of management with respect to conducting an operation which is economical and profit-producing?

A. You mean, have I given any consideration to it, have I thought about should management have a profit-producing operation—I am not clear about your question as to what you mean by having given consideration to the profit to management.

Q. You have testified here time and time again on these exhibits with respect to this opportunity for employment. In your opinion, is opportunity for employment something that is frozen once it is attained; or is it subject to economic forces?

A. It is subject to all kinds of economic forces.

Q. What other things is it subject to?

A. It is subject primarily on an air line to the number [2290] of aircraft-miles and the number of aircraft-hours available. Now, those things in turn are subject to many things. The number of aircraft-miles and number of aircraft-hours flown may be a function of the volume of consumer purchasing

(Testimony of S. Herbert Unterberger.)

power; it may be the function of a number of aircraft accidents, as to whether consumers are ready to ride the air lines; it may be a function of particular personal preferences; it may be a function of an advertising campaign; it may be a function of all sorts of things.

Q. All right. Let's take February and March, 1947, when Western Air Lines was operating four schedules on Route 68 between Denver and Los Angeles. Do you know what the load factors were on those schedules?

A. Not without reference to the reports.

Q. Do you know what they were in April and May of the same year?

A. Not without reference to the reports.

Q. Do you know what they were in June and July? A. The same answer.

Q. Do you know whether there was a change in schedules brought about by economic forces?

A. I am not sure what you mean by "economic forces." Do you mean all of the things I recently enumerated?

Q. No, I am not adopting your testimony, Mr. Unterberger.

A. Then I don't understand your question.

Q. Do you know what an air line takes into consideration in arriving at a schedule—what factors?

A. I would believe that they take into consideration first off how much business they can do. [2291]

Q. All right. What else?

A. Well, I could visualize many.

(Testimony of S. Herbert Unterberger.)

Q. They have to take into consideration costs, wouldn't they? Isn't that most important?

A. I don't know what the most important is. I would expect that they would worry about costs. I am not sure about what they——

Q. It is very apparent that you are not worried about costs in your testimony.

Examiner Wrenn: That is an observation of yours, Mr. Renda. There is no need to expect the witness to answer it.

Mr. Renda: I am sorry.

Q. (By Mr. Renda): Now, let's turn to some of these exhibits, your Exhibit No. 2, number of aircraft-miles.

Do you know that in February of 1947 the total revenue-miles was slightly better than—by the way, these are millions, aren't they, not thousands?

A. Yes, I guess they are. I am not—I think you are right.

No, that is not right. These are thousands. These are thousands.

Q. That is right, they are thousands.

A. They are millions when we deal with passenger-miles.

Q. You notice in February, 1947, it is slightly better than 596,000, and in September of that same year 591,000-plus.

Would you say that is pretty stable? [2292]

A. I regret that I have difficulty with the word "stable." What do you mean by "stable"?

Q. Is there a substantial variation there between

(Testimony of S. Herbert Unterberger.)

the number of revenue-miles operated in February, 1947, and September, 1947? That is simple.

A. Yes. There is a difference there of roughly 22,000, but——

Q. Is that——

Mr. Bennett: Let him finish the answer, please.

The Witness: I want to talk about the subject "stability"——

Q. (By Mr. Renda): Well, now, you just answer my questions.

A. Well, sir, I am doing that.

Mr. Bennett: Mr. Wrenn, I submit that the witness has the right to finish his answer.

Examiner Wrenn: Let the witness finish his answer.

The Witness: The instability being that in February this air line was operating Route 68 at four schedules a month. In September part of the month it was operating Route 68 and part of the month it was not. Even for the part it was operating it was operating it at a reduced number of schedules. At the same time, however, it was instituting Route 63 and instituting Route 63 at an exceedingly high level, and one that had never subsequently attained. Hence, the term "stability" is peculiarly inappropriate to those figures.

Q. (By Mr. Renda): Let's look at October, 1947. We have no question of Route 68 schedules in that month, and the figure is 527,552. [2293] And compared to February, 1947, it indicates a decrease

(Testimony of S. Herbert Unterberger.)

of approximately 41,000 revenue aircraft-miles. Is that correct?

Now, would you say that is an unusual cut-back? Do you say that difference is substantial, so as to bring about a diversionary effect, an adverse effect on pilots?

A. Well, there is a cut-back there—there is a difference between October and February of roughly 8 per cent. However, I think it is important to observe that using February is using a very curious month. That is two days short—two days on thirty is roughly 8 per cent, isn't it? So that a comparison between February and October, using just the global figure of 569 and 527 is exceedingly inaccurate. As a matter of fact, if February were a 30-day month, and had the additional two days worth of flying in there, the drop would not be 8 per cent, but perhaps twice that much.

Q. Well, now, do you know what schedules Western was operating in February, 1947, as contrasted to October, 1947?

A. My data here only shows the schedules operated with respect to Route 68, and that is clear. They were operating four in February and none in October.

Q. Let's turn to Exhibit 3.

By the way, why do you choose the period February to July as the period to form the basis for all your comparisons percentagewise?

A. I explained that, sir. The reason is that February to July was the period when Route 68 in 1947

(Testimony of S. Herbert Unterberger.)

was operating at the most stable level. They were operating four schedules every one of those months. Apparently they had shaken down [2294] to that level. And it gives us a half-year period there with Route 68 not a problem. It was neither building up or sloughing off. It appeared to be stabilized at four schedules a day.

Q. Do you know what brought about Western's reduction in schedules on Route 68 in August, 1947?

A. The reports they made to the Civil Aeronautics Board revealed that they transferred two airplanes.

Q. Do you know what was the aircraft utilization on Western's DC-4's in July, 1947?

A. I know I don't have that data here.

Q. Do you know what they were in August, 1947 —what utilization was on those airplanes, DC-4's?

A. No. Again I do not have that data available right now.

Q. These airplanes that were transferred, who were they transferred to?

A. If my memory serves correctly, they were transferred for use over the Los Angeles-Seattle route.

Q. So that they would still be utilized in the Western's system? A. Why, of course.

Q. Do you know what date the Board issued a decision consolidating United's routes and American's routes and T.W.A.'s routes so they could fly non-stop from Chicago to Los Angeles?

A. No, sir.

(Testimony of S. Herbert Unterberger.)

Q. Did you take that into consideration in evaluating whether Western's management was prudent in starting to reduce [2295] schedules on Route 68?

Mr. Bennett: I don't think that at any time he indicated that Western was prudent or imprudent, or that he made any investigation with reference to that subject, and I take it that is not a proper cross-examination of the witness.

Examiner Wrenn: Mr. Renda, I will let him answer whether he took that into consideration when preparing the exhibit.

The Witness: Is that the question, Mr. Examiner? I don't remember it exactly.

Examiner Wrenn: Do you want to rephrase the question?

Mr. Bennett: Read it.

Mr. Renda: I can rephrase it, Mr. Examiner.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): You testified you were not familiar with the Board's decision that resulted in consolidating American, T.W.A., and United's routes so they could fly non-stop from Chicago to Los Angeles.

A. I testified I didn't know the date.

Q. You are familiar with the decision?

A. That they came out with such a decision?

Q. Yes. A. Yes.

Q. I am asking you whether you took that factor into consideration in determining whether there was justification for Western decreasing its schedules in August from four to two on Route 68?

(Testimony of S. Herbert Unterberger.)

Examiner Wrenn: I don't know whether he has testified as to the justification. If he hasn't, he can say so. [2296]

The Witness: That is precisely the answer I want to make. I gave no testimony, I passed no value judgment——

Q. You didn't take that factor into consideration?

A. No, sir. I passed no value judgment on the question of Western's justification or prudence, for that matter.

Q. Now, Mr. Unterberger, if you are so sure that the normal operating period was between February and July, 1947, when the schedules operated amounted to four, how do you explain that United Air Lines, after the route was transferred, and after about six or seven months' experience in the peak season, the summer, June, July, August, and September, 1948, only operated two schedules?

Examiner Wrenn: Read that question back, please.

(The question was read.)

Mr. Bennett: May I say this: I don't think he said he was sure about anything. He told the reason he had taken those months.

Examiner Wrenn: Let him answer. If he has testified that, he can say so, and if he didn't he can straighten it out. There isn't any intention here, Mr. Witness, of making you testify anything you

(Testimony of S. Herbert Unterberger.)

did not testify to. If counsel misstates you have no hesitation in saying so.

Mr. Renda: I had no intention of misstating his testimony.

The Witness: Of course I did not say that I was sure the six months' period, February through July, reflected the normal operating experience. Quite the opposite. What I said was that I used those six months as a basis for [2297] comparison because they appeared to me to be the best six months for comparison purposes. And the reason they appeared to me to be the best six months for comparison purposes is that it appeared on the basis of this data that Western had stabilized its operation of Route 68 at four schedules a month. And I used that six months for one purpose, and one purpose only, that is, to compare that six months with an identical six months' period in other years.

Now, it is an essential to do that, essential to compare identical six months' periods in other years, to avoid any distortions due to seasonal influences, and that avoids distortion due to seasonal influences.

Mr. Renda: Mr. Examiner, this witness has not answered my question at all. He just rambles on.

Examiner Wrenn: All right, the witness has testified as to what he testified to.

Now, go ahead with your question.

Q. (By Mr. Renda): Mr. Unterberger, you may perhaps have taken exception to the characterization of whether you were sure. But the fact still

(Testimony of S. Herbert Unterberger.)

remains that in every comparison you have made the basis you have used is the months of February to July. That is correct, isn't it?

A. No, not in every comparison.

Q. Let's take Exhibit 17.

A. That is every comparison on Exhibit 17, sir?

Q. Yes. A. Yes.

Q. All right. So you have used February-July because [2298] in your opinion that is indicative of the best basis for a comparison.

A. I will accept that statement if you remove the word "indicative."

Q. So, then, we are not in disagreement?

A. I am not sure about that.

Q. As to the period February to July, you are satisfied that in your opinion that was the normal operating period? A. No, sir.

Q. Then what was the normal operating period?

A. Mr.——

Q. You tell me what was the normal operating period, if it wasn't between February and July, 1947?

A. Mr. Examiner, I don't think that in my entire testimony I ever used the term "normal operating period." I did not testify to "normal operating period." I am not exactly sure what is meant by a normal operating period. Those words have very specific meaning. This is a dynamic situation, and I am not sure that there is a normal operating period in a dynamic situation.

However, we do have to make comparisons, and

(Testimony of S. Herbert Unterberger.)

I selected the period which seemed to me on the basis of reasons I stated—very cogent reasons, I believe—to be the best period for the purpose of making comparisons. I have not characterized them, sir.

Q. Then, let's take the best period you have used, that was February to July.

A. Best for the purpose of comparison. [2299]

Q. Yes. A. Yes.

Q. Now, answer my question as to why you would use that as the best period for comparison, when as indicated by your Exhibit 16 United Air Lines after operating for seven or eight months, and having had that experience, started out in June by operating only two schedules per month—per day, that is—on Route 68 between Denver and Los Angeles?

Examiner Wrenn: Read the question back to him as corrected by counsel.

(The question was read.)

The Witness: Well, we have to make a correction of facts, first. They operated three schedules, according to my Exhibit 16. One is a cargo trip.

Q. (By Mr. Renda): I will correct the question again: Two passenger trips. Western never operated cargo schedules. We are comparing the two.

A. I am awfully sorry, but could I ask to have the question again?

Examiner Wrenn: Read the question.

(The question was read.)

(Testimony of S. Herbert Unterberger.)

The Witness: My reasons for using that period are the same as I said before. They are, to repeat if need be, that this is the period when Western Air Lines apparently had stabilized its operation at four trips a day. The fact that United wanders around and sometimes had four trips and sometimes had three, while a fact, does not seem to me to mean that the selection of that six months' period is inappropriate. [2300] It is a fact.

Q. Well, doesn't your Exhibit 16 definitely show, Mr. Unterberger, that even though United may have been optimistic when it first started to operate Route 68 in September, and had four passenger schedules, that it obtained experience combined with the fact that it was flying non-stops from Chicago to Los Angeles, which is an influencing factor here, it finally cut down to two schedules, and would you say then that two schedules was all that segment could support?

A. Well, I think it is essential to point out that United thought it could support four—five initially—four initially and then five; four and a cargo trip. And then three and a cargo trip; and then two and a cargo trip; and more recently with even additional knowledge and far more experience it now thinks it can support three and a cargo trip. And it has now for many months—one, two, three—seven of them by the time of the last report available to me, apparently feels it can support three and a cargo trip. And, in addition, it feels that Chicago-Los Angeles can support a great deal more.

(Testimony of S. Herbert Unterberger.)

Q. Well, Chicago-Los Angeles, other than that it may be related to the question of traffic that is moving over the Route 68—I mean, it is not in issue here as to the number of schedules.

A. To be sure, except insofar as it relates to your question.

Q. Do you know what United's load factors were on the four passenger schedules it operated in November-December, 1947, January, February, and March, 1948? [2301]

A. I don't have those data available here.

Q. In making your computation of route-miles, did you consider the Denver-Los Angeles route for the entire distance, or did you limit that segment only to the part that Western actually did not continue to operate, that is, from Las Vegas to Denver?

A. I am not sure about that.

Examiner Wrenn: Just a minute. I didn't hear the last of that answer.

You added part of an answer.

The Witness: That part of the answer was that I didn't understand the question.

Examiner Wrenn: All right. Proceed.

Q. (By Mr. Renda): Are you familiar with Western's Route 13? I will tell you what it is: It starts from Los Angeles—for the purposes of this discussion—goes to Las Vegas and continues to Salt Lake City. A. Yes.

Q. Now, you are familiar with Route 68. That was the route from Denver that stops at Grand Junction, Las Vegas, and Los Angeles. So that both

(Testimony of S. Herbert Unterberger.)

68 and 13 parallel the segment between Las Vegas and Los Angeles. Do you have that picture?

A. Yes.

Q. My question is, in computing the route-miles in these various exhibits, did you measure the Route 68 full mileage from Los Angeles to Denver, or consider only the mileage between Las Vegas and Denver?

A. No, these were reported to the Civil Aeronautics [2302] Board, as I remember, Los Angeles to Denver. I think you are referring to my Exhibit 9, is that right?

Q. That is one of them, yes.

A. That was reported to the C.A.B. as Los Angeles to Denver, not Las Vegas to Denver.

Q. In making comparisons such as you have made in this case, do you think you should take into consideration the fact that Western continues to serve that segment between Los Angeles and Las Vegas by reason of the fact that it is part of another route and therefore if that same traffic is there it will operate the schedules necessary to carry that traffic?

A. Those data are included in this data. They are under the so-called "Other" classification. Table 9 includes the total revenue passenger-miles operated by the system. There is nothing excluded.

Q. Well, in your Exhibit 4, is that included in there?

A. Well, that is the total Western system. Obviously it has to be included. There are no exclusions

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on Exhibit 4. As a matter of fact—well, that is not passenger-miles. The columns on Exhibit 9 will add up to total revenue passenger-miles.

Q. What I want to make sure of is, in these computations you have regarded Route 68 as a route from Los Angeles to Denver and not only as a route from Las Vegas to Denver.

A. I think the answer is yes, but let me make absolutely sure.

Q. All right.

A. The data you people reported to the Civil Aeronautics [2303] Board, Los Angeles to Denver, are the data that are found in Exhibit 9—I guess Exhibit 9 only. That is the only place where I have a breakdown. So that seems to me to include the route from Los Angeles to Denver.

Q. All right. Now, let us turn to Exhibit No. 11. Here you compared Western with all domestic carriers. Have you made any study as to how Western would compare on this same basis with a group consisting of Chicago & Southern, Braniff, Delta, National, Mid-Continent, and Continental?

A. No. I have only made the comparison between Western and all domestic carriers.

Mr. Renda: That is all, Mr. Examiner.

Examiner Wrenn: Mr. Reilly, have you any questions?

Mr. Reilly: Yes, Mr. Examiner.

Q. (By Mr. Reilly): Mr. Unterberger, will you tell us a little more about your experience? Where did you go to school?

(Testimony of S. Herbert Unterberger.)

A. I am a graduate of the Wharton School of the University of Pennsylvania.

Q. Commerce?

A. Commerce. And I have a Master's Degree from the graduate school of that same university.

Q. Did you go to work for this Labor Relations Information Bureau immediately you left school?

A. Oh, no, sir.

Q. Will you tell us a little more about what you did then?

A. Well, yes, sir. I went to work initially on leaving school for the Federal Government. Initially I worked on [2304] problems of employment—actually, it was work relief in those days. They were setting up employment projects. We were establishing employment projects and methods of wage payment.

Q. What agency was it, Mr. Unterberger?

A. The agency names change. It was, I think, Federal Employment Relief Agency, and quickly became the Works Progress Administration, and may have become something else.

Q. Was that Mr. Frank Walker's set-up?

A. No, the late Corrington Gill.

Q. When did you become associated with the Labor Relations Information Bureau?

A. Actually, I was one of the people who organized Labor Relations Information Bureau. I am a partner in that.

Q. That is about 15 years ago?

(Testimony of S. Herbert Unterberger.)

A. No, that was only about three years ago. That was roughly in March of 1947.

Q. Who are some of the other partners?

A. Max Malin is the name of the other partner.

Q. Have you ever done any work in the field of commercial air transportation, such as the exhibits you are presenting here, for the same purpose you are presenting the exhibits here?

A. I have analyzed Civil Aeronautics Board data previously, and analyzed C.A.B. data for the Air Line Pilots Association on several occasions.

Q. For what purpose?

A. Well, I made similar analyses and made similar presentations before Civil Aeronautics Board Trial Examiners, [2305] and recently before the National Mediation Board in representation matters.

Q. Did you ever work for an air line?

A. No, sir.

Q. Did your partner ever work for an air line?

A. No.

Q. I take it, then, you nor your partner have ever had any experience in air line traffic, air line scheduling; is that correct?

A. I don't know what you mean by experience. I feel by now I have had fairly substantial experience.

Q. Are these exhibits an indication of your experience? Tell us what these exhibits of yours show with respect to your experience with schedules and traffic?

(Testimony of S. Herbert Unterberger.)

A. Perhaps I misunderstood you. Will you tell me what you mean?

Q. Have you ever set up the various things that go into making up schedules and handling traffic, that go into the job?

A. Obviously not. I have never worked for a commercial air line.

Mr. Reilly: I ask that the word "obviously" be stricken.

Q. (By Mr. Reilly): Have you ever had any similar experience with respect to the operation of a commercial air line?

A. I am sorry, I missed that statement. I was disturbed by the previous comment.

Examiner Wrenn: Read the question.

(The question was read.) [2306]

A. I have never worked for a commercial air line.

Q. (By Mr. Reilly): Now, in these statistics which you have presented in these various exhibits, did you take into consideration any competition, new competition, which had been afforded either Western Air Lines or United Air Lines, as a result of certificates issued by the Civil Aeronautics Board in the periods shown in your exhibits?

A. Well, I have testified not at all about certification of other air lines.

Q. Well, frankly, so we will understand what I am after, you have made a lot of conclusions, both in the explanatory data and in the summary of your

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exhibits here that leave the conclusion that you have some expertness in the scheduling and operations, and then you speak in terms of opportunity for employment.

I would like to have the record show just what you did with respect to the setting up of these figures on sheets of paper for presentation here, so the Board will know which element you considered and which element you did not consider. That is all I am interested in.

Mr. Bennett: I don't know whether that is a question, or not.

Examiner Wrenn: He was just explaining to the witness what he had in mind, what he wanted.

Mr. Reilly: I thought we could save some time.

Mr. Bennett: Now he wants to ask a question?

Mr. Reilly: That is right. [2307]

Q. (By Mr. Reilly): Did you in setting up both the decrease in available miles or miles operated by Western give any weight whatsoever to the operation of the Chicago-Los Angeles non-stop operated by United which was authorized by the Board in May, 1947?

A. Yes, sir; but may I explain? I think this requires a little explanation.

Examiner Wrenn: Go ahead.

The Witness: These data that are on these exhibits, there is no—we know exactly where they came from. Now, my function here was to take them and attempt to relate them to each other in some meaningful manner and draw the conclusions

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which are quite obvious from them—certain conclusions that are quite obvious from them.

Now, using that data, analyzing them and organizing them, and even drawing conclusions from them are not something that is materially peculiar to the air line business. It is done for every type of business. I have done this for the steel industry, and the railway industry, and other industries.

Mr. Reilly: I am not interested in what you did for other industries.

I move to strike that, Mr. Examiner.

Examiner Wrenn: I think there was a question pending and you have not yet answered it.

The Witness: No, I haven't answered it yet, sir.

Examiner Wrenn: All right.

The Witness: The general question of whether I am taking certain things into consideration is something which I find exceedingly difficult to answer—— [2308]

Q. (By Mr. Reilly): There is nothing general about it. I asked you if you took into consideration the Chicago-to-Los Angeles non-stop by United, and the effect it might have on the existing schedules Los Angeles-Denver——

A. I took it into consideration on Exhibit 16. That is the reason I put Chicago-Los Angeles on Exhibit 16.

Q. Do you know when the service started?

A. Chicago-Los Angeles?

Q. Yes. Non-stop by United.

(Testimony of S. Herbert Unterberger.)

A. No, I don't know the exact date. I do know it started prior to the transfer of Route 68.

Q. Subject to correction, and for the record, this is from the Official Air Lines Guide, I believe you will find it started in July.

A. That is about as accurate as I was. It started prior to the transfer of Route 68.

Q. Did you take into consideration, Mr. Unterberger, what effect, if any, the mechanical failures, or failures to complete all scheduled trips by Western might have had upon these data?

A. The mechanical failures and failures to complete trips are a constant in practically all data. They always happen, I would think. Sometimes they may be a little worse than otherwise, for specialized reasons, but they are a constant factor and would have no real effect on conclusions to be drawn.

Q. Did you take into account the effect of the accidents that happened in the year 1947 on passenger travel? [2309]

A. In what respect?

Q. On what it might have done to both United and Western's performance.

A. I did not testify as to what might have happened to United and Western's performance. I testified as to precisely what did happen.

Q. Well, you have proven—strike it.

What instruction did you receive from the A.L.P.A. with respect to your study on the Burlington Formula? A. None.

(Testimony of S. Herbert Unterberger.)

Q. How long have you been working for Air Line Pilots Association, or under retainer?

A. I am not under a retainer.

Q. Are you paid per assignment?

A. Yes. I am paid for what I bill them.

Q. Well, I am not going to ask what you bill them, because I wouldn't tell you what I bill people. But I am trying to find out whether or not you are paid per job or are on an annual retainer.

A. No. I answered that. I do not have an annual retainer.

Q. Mr. Unterberger, as you probably know, from November, 1947, to April, 1948, DC-6 aircraft were grounded. Are you familiar with that?

A. Yes.

Q. As a consequence, United did not operate any non-stop service Chicago-Los Angeles. Did you take that into consideration in the compilation of this data? A. From—— [2310]

Q. November, 1947, to April, 1948.

A. November, '47, to April, '48——

Q. I think it was the middle of November.

A. Well, the consideration that was given will be found in Exhibit 16. That there were three months there, January, February, and March when there were no such trips scheduled.

Mr. Bennet: What months?

The Witness: January, February, and March.

Q. (By Mr. Reilly): What is the matter with November and December, 1947?

A. There were trips scheduled, at least as re-

(Testimony of S. Herbert Unterberger.)

ported in the Official Air Lines Guide.

Q. What you have then is what you took off of C.A.B or other official documents; is that correct?

A. Precisely what I said.

Q. You are familiar that United has a restriction that they cannot operate local trips, or are you, between Las Vegas and Los Angeles?

A. No.

Q. What consideration did you give to the fact that they might operate the mileage but United is not carrying any passengers between those points?

A. Well, there was no occasion to give that point any consideration.

Q. That wouldn't be in Exhibit 16 in this catch-all classification?

A. No. Exhibit 16 doesn't have that [2311] classification.

Q. Well, the catch-all——

A. No, the catch-all "Other Classification" refers to Western only, not to United.

Q. You are not familiar with the restriction; is that right? A. What is that?

Q. You were not familiar with the restriction.

A. No, sir.

Q. What significance, if any, did you give in the Western mileage to the operation of schedules between San Francisco and Los Angeles by the so-called irregular non-federal certificated carriers?

A. There was no necessity to give that any consideration, either. I have never alluded to it.

Q. Do you think it might have some effect on

(Testimony of S. Herbert Unterberger.)

the passengers being carried, or the mileage being operated?

A. Among a great many factors it undoubtedly is one.

Q. Have you ever looked at any statistics as to what they were carrying between those points?

A. Between?

Q. Los Angeles and San Francisco.

A. I have never looked at it.

Q. Would it surprise you to know that they are carrying more passengers than the certificated carriers between those points?

A. I wouldn't be surprised.

Mr. Reilly: That is all I have.

Examiner Wrenn: All right. We will take a five-minute recess before Mr. Kennedy begins his cross-examination. [2312]

(There was a short recess taken.)

Examiner Wrenn: Mr. Kennedy, you may examine the witness.

Q. (By Mr. Kennedy): Mr. Unterberger, would you turn to Exhibit No. 9, please.

Under the column "Los Angeles-Denver," for the months of February to July, 1947, you show a certain number of revenue passenger-miles per month. The question I want to ask you is: Don't you think it probable that if Western had continued to operate Route 68 those figures would have been smaller in 1948 and 1949?

A. Well, I really don't know. They were oper-

(Testimony of S. Herbert Unterberger.)

ating four schedules at that point. It is entirely hypothetical. I just don't know.

Q. Are you familiar with the record of the first hearing in this case, Mr. Unterberger?

A. The complete transcript?

Q. No, the exhibits I had in mind.

A. I can't testify to complete familiarity.

Q. There was an exhibit there that showed a certain amount of Western's traffic over Route 68 was derived from connections with United at Denver. A. Yes.

Q. In other words, Western participated with United in the carriage of Los Angeles traffic. After the authorization of United to go into Los Angeles direct, don't you think these figures would be reduced?

A. First of all, United was authorized to go into Los [2313] Angeles at an earlier point. The July figures might reflect that. It really doesn't. Secondly, the best measure of that, if we had one, to hypothecate—that is, Western had given good service or bad service, you never can tell, but the best measure, so far as we can get one, is what did United do when they got it. And you go to Exhibit 16 and you find it. Denver to Los Angeles. United took the route over, and United suffered under the same disability of competing with itself, over the non-stop Chicago-to-Los Angeles route, and United supported for the first five months of the year—United operated for the first five months of

(Testimony of S. Herbert Unterberger.)

the year three passenger and one cargo trip, for the remainder of the year two passenger and one cargo, and for the remainder of 1949 three passenger and one cargo. That is, the amount of employment offered by that route is now four round trips, which is exactly what you are referring to in 1947 on Western.

Q. Don't you think that United would be more likely to route Chicago-Los Angeles traffic via Denver when it has the Denver-Los Angeles route than it would have when Western had it?

A. Well, I don't know what United's policy would be in that respect. I mean, when I get down to buy an air line ticket I have some say in which way I go, too, and when I have the option I normally go non-stop.

Q. I think we can agree with that, Mr. Unterberger, but aren't there cases where passengers are more or less in the hands of the line?

A. Particularly when he is up in the air.

Q. Well, particularly in the matter of routing, don't [2314] you think there are many passengers routed via Denver that it wouldn't have routed if Western had that route?

A. I am not prepared to say what United would do under the circumstances. It is sheer guesswork, and anybody's guess is as good as mine.

Q. Would you turn to Exhibit No. 11, Mr. Unterberger. Are the carriers that are shown for the years 1948 and 1949 here the all-domestic air mail

(Testimony of S. Herbert Unterberger.)

carriers, the same carriers that are shown in 1946 and 1947?

A. No. There may be slight differences, if any carriers went out of business and new carriers came into business. Obviously those that went out of business would no longer be shown, since it is a global figure and those that came in would. But this does show what happened to the domestic air line industry. The total domestic air line industry.

Q. Well, in 1946—let's take 1946 and 1949. Did you show there feeder carriers in those years?

A. Oh, yes. It includes——

Q. You included feeder carriers in all domestic?

A. Oh, yes. They are domestic carriers.

Q. That is, every carrier certificated to carry mail, whether trunk or feeder?

A. Yes.

Let me make that very specific: What I did was that I combined that statistic with a combination of trunk line, feeder line—that is right. It is the certificated carriers.

Q. And your source is the recurrent report of mileage [2315] and traffic data.

A. That is right.

May I correct that? It includes territorial as well.

Q. It includes territorial? A. Yes.

Q. That would mean it would include Hawaiian Air Lines?

A. Yes. It includes everything that is labeled a domestic air line carrier. It does not include international or overseas.

(Testimony of S. Herbert Unterberger.)

Q. Would you turn to Exhibit 18.

What was the occasion of the preparation of this document?

A. Around the end of last year some time Mr. Behncke and I had a conference. Mr. Behncke said to me: "We are now being faced with the problems of consolidation. They are becoming serious. I believe he mentioned the Route 68 as one of the kind of problems that occur. "So what we would like is for you to investigate the whole situation and provide a generalized report on the Burlington Formula."

We talked about the experience on the railroads, with which problems there I had some experience in connection with the Railway Retirement Board.

Thereupon, I prepared the report entirely on my own—no further conferences—and submitted it.

What we have here are excerpts. They are not complete reports. There was a lot of statistical documentation which while available at all times are not fully transcribed here.

Q. Did you do the editing to take this out of the [2316] original draft?

A. I did this—I was asked to suggest which the pertinent parts are, and I did that. This follows my memorandum. There is a little workmanship problem along in here. There is a Table 5 but no Tables 1, 2, 3, and 4, which probably worries you. It did me, too. But by and large this represents the sense of the total document.

Q. Do you have any opinion, Mr. Unterberger,

(Testimony of S. Herbert Unterberger.)

as to whether in general some air line mergers might be desirable?

A. Oh, yes, I have an opinion. I think that in almost any industry there are certain cases where mergers are desirable, for operating efficiencies and many other reasons.

Q. Would you agree with me that in some cases to some extent operating efficiencies are accomplished by reduction in personnel after the merger is accomplished?

A. That in some cases?

Q. Yes, in some cases.

A. With the emphasis on "in some cases." On the railroads, as a matter of fact, there is a debate as to whether that is true or not. So, in some cases.

Q. You say that in some cases operating efficiencies in the air line business as a result of mergers would be effectuated by a reduction in personnel?

A. It is a hypothetical situation, to be sure. I think there would be cost saving. I am a little less sure about operating efficiencies coming about by a reduction in personnel.

Q. I will accept your correction. There would be cost saving. [2317]

A. There could be cost saving.

Q. There could be?

A. May I emphasize that to a certain extent? Cutting off personnel doesn't always save costs.

Q. Well, I will accept that. But can we agree that sometimes it does? A. Oh, of course.

(Testimony of S. Herbert Unterberger.)

Q. And would you say that in some cases that would be desirable, particularly where the merged carriers were subsidized carriers and operating at the expense of the taxpayer?

A. I think that in general saving the taxpayers' money is a fine thing.

Q. And just a little more specifically, that it might be a good idea in some air line situations?

A. There you have to weigh the equities, it seems to me. The Federal Government has a great program in maintaining employment and is willing to spend a lot of money in that purpose.

Now, in the railroad situation, as a matter of fact, the equities were discussed in great detail, as to whether there ought to be railroad consolidations in the face of declining employment.

As a matter of fact, in general, I think it is not inaccurate to say that Congress came to the conclusion that it should not be effectuated if there were substantial declines in employment. But that was in the atmosphere of the 1930's. But I don't know what it would be now. But they weighed the equities. They said it might be better to keep these people on the railroads rather than throw them off the [2318] railroads in the face of consolidations and then work out a program to take care of the employment.

Q. Well, if you look at it as a matter of policy, you would say that is so in the face of declining employment, recession, depression. If you had a situation of full employment, upward spiraling of

(Testimony of S. Herbert Unterberger.)

economic development, wouldn't you say that if with a given industry you could reduce the liability of the taxpayers by so doing, and resultant cost savings, that it would be desirable to do that?

A. That would depend on the industry and what other factors are involved. In the air lines I feel that air line pilots are a resource in a variety of ways. My statement here indicates that. I don't want to do any flag waving, but I think here they are a resource from the standpoint of the national security, and you would have to weigh that in spending a lot of money to have our military resources up to snuff. And, as I think I say in this report, you can store airplanes but you cannot store pilot skills. And I think you have to weigh where the national interest is.

Q. Well, let me ask you your opinion as to where it lies. Wouldn't you say that at the present time, assuming the existing state of affairs in the air line industry that some mergers might be desirable?

A. Oh, yes. I think I answered that question before. The real question I think you are getting at. though, is do I think that pilots should be displaced through mergers, that the end effect of that should be that pilots who flew for the industry should no longer fly for the industry. Is that what you have in mind? [2319]

Q. All right, let's proceed with that.

A. Do I think that the pilots should be cut off from the industry?

(Testimony of S. Herbert Unterberger.)

Q. Assuming that you can effect a desirable cut in cost of operations as a result of merger.

A. This is strictly personal opinion, and I don't think I could bind the air line pilots on this.

Q. No, I don't want you to bind them.

A. And I am not sure they wouldn't agree with me.

If a national emergency existed and a demand for mergers, and if as a result of the national emergency the pilots were cut off—and I haven't the answer to that question; there are ways of not cutting off the pilots—then the answer follows, sure, but the answer to that does not—I don't want to engage in fine points about this. The end result of mergers might be operating efficiencies—as a matter of fact, the case we are talking about is not a merger at all——

Q. No, I am talking in general, not about this case.

A. And nothing I say here really affects this case. It is not a merger. There is no connection between this and a merger in any respect.

Q. Well, there is some connection but we can leave that to the Examiner and the Board.

A. Well, I just want to make it clear I am not talking about this case, because this is not a merger. I am not talking about an abandonment because this is not an abandonment.

Q. Well, let's take the first case, that it is desirable to have some mergers, and thereby effect some cost [2320] reductions by reducing personnel

(Testimony of S. Herbert Unterberger.)

Wouldn't you say that—let me rephrase that: Wouldn't you say that it would be desirable to have some mergers and effect cost savings by reducing personnel?

A. You have me in the realm where I could conceive, I could set up a hypothetical situation where I could say to myself under that hypothetical situation, yes. I don't know whether that hypothetical situation exists in the real world, or not. I could also set up a hypothetical situation in which I could in my own mind be very convinced that the answer is "No." When you say "some," I assume that could be as low as one, could be as low as half a one.

Q. Well, do you have any thought as to the present situation as to whether some mergers would be desirable?

A. Well, I would be hard pressed to—I just don't now have an informed opinion about whether some—to say that, I would have to have in mind which. I do not now have in mind which.

As a hypothetical situation, surely, you should get the best out of your resources.

Q. Suppose that a merger is desirable, and the merger finds itself with more personnel than it needs. Do you think it should retain the unnecessary personnel?

A. That is a question-begging question — unnecessary personnel. I don't think—I think that it is an inefficient use of human resources to have trained people not using those skills at their maximum level. That is an inefficient use of resources.

(Testimony of S. Herbert Unterberger.)

Now, if the thing you have in mind is having some people [2321] sit around who are fully trained and drawing pay indefinitely, then I think that is an inefficient use of resources, and, as an economist, my soul sort of rises against that.

Now, if you are talking about the transitional period when people with some skills find their skills obsolete, for one reason or another, such as technological or organizational changes, such as mergers, and so forth, then I think that the social course of those things involved in getting that improved efficiency should be borne somewhere, not necessarily by the individual.

At the moment most of the social costs of technological improvement, which includes better equipment and better management, which is a technological improvement—most of the social costs of those, except in the railroads where there are agreements, such as the Washington agreement, and so forth, is borne by the person least able to bear it—the particular individual who gets chopped off the pay roll.

And sometimes there are minor kinds of dismissal pay arrangements. General Electric has a dismissal pay arrangement, but what is it good for? A couple of weeks. Lay off a tool maker and give him a couple of weeks of dismissal pay. Hardly the way of bearing the social costs of improved technology, to my way of thinking.

Now, in the railroad industry there has been an assessment to a great extent of the social costs of

(Testimony of S. Herbert Unterberger.)

improved technology. It goes under the name of the Washington agreement, Burlington Formula, and so forth. But there is a very important point when we discuss that, that is, that all of those arrangements are arrangements which are not a substitute for [2322] merging the employees, integrating the employees.

Put it this way: The Burlington Formula, which incidentally deals with abandonments, and is not a case in point here—the Washington agreement more so—is based on the underlying assumption that first there will be an integration of the personnel. First, there will be an integration of the personnel and thereafter some people who are disadvantaged will receive these kinds of displacment allowances which will permit them an adequate standard of living during the period of their transition. But it must be remembered that it is not a substitute for first integrating the personnel. It never was, and it just was never so designed.

And if I may say so, the discussion of the Burlington Formula as an alternative to the pilot's proposal here is quite inappropriate. It is a misunderstanding of the Burlington Formula or the Washington agreement.

Q. Who misunderstands it? The pilots?

A. No. I haven't——

Q. Doesn't Mr. Stephenson misunderstand——

A. ——misunderstood——

Q. I think there is a misunderstanding, but it is the pilots' misunderstanding.

A. That may be so. I insist that I haven't mis-

(Testimony of S. Herbert Unterberger.)

understood it. The Burlington Formula occurs—I don't like the Burlington Formula here. It was a specialized case where there was one agreement for one Burlington case. The Washington agreement, which is much more broad, is that first the employees are integrated, and then if there are people who are inconvenienced thereby there is a monetary compnsation. [2323]

Q. Wouldn't that be the way to solve the problem here? To take on the pilots required for the additional operation, but not more, and possibly there might not be any, and then take care of the others by the Burlington Formula?

A. I am really not prepared to say that. If you want a personal opinion, I don't think so.

Also, I think your end conclusion as to the results is probably not accurate. I don't know what you mean by United taking them on. If they followed the air pilots' general position of transferring the employees with the routes, then I think there might be a legitimate concern, if people are bounced off the end of the seniority roster. I don't know whether there would be, or not. We just don't know about that. And perhaps there should be some bearing of that social cost by somebody. But the first step has to be taken first before we get the second.

Let me add another point to this discussion: That is, I don't think we should neglect the fact that the purpose of the Burlington Formula—really, not the Burlington Formula—the purpose of the Washington agreement was not primarily to compensate peo-

(Testimony of S. Herbert Unterberger.)

ple who get thrown out of employment. That was not the purpose of the agreement.

Examiner Wrenn: Let me get in here and ask a question on that: You have produced 16 exhibits here. The effect of those exhibits, as I understand them, at least your own conclusions of them, are that the transfer of Route 68 to United has had a very striking effect on Western Air Lines since that time. You have shown how various statistical indices [2324] have gone down. You have drawn the conclusion from that that that has had an adverse effect on the employment.

Now, what do you propose, or what is your idea for those individuals who are adversely affected here. You say the Burlington Formula is inapplicable. Captain Stephenson says "We want a certain number of individuals who were on Route 68, or the equivalent, to be transferred to United." But your exhibits and your testimony is that pilots up and down the line, and not only pilots up and down the line, but other employees there, would be adversely affected.

Now, where would these pilots you say are adversely affected by this decision of management be left?

The Witness: I am not sure. Let me see. If the pilots on Route 68 had been transferred together with Route 68, the adverse effect would not have resulted because while Western Air Lines' system declined——

Examiner Wrenn: One of us certainly misunder-

(Testimony of S. Herbert Unterberger.)

stood your testimony, if that statement is correct.

The Witness: Well, may I try to clarify it insofar as I possibly can.

My Exhibit 16, for example, demonstrated that the pilots on Western, if they had gone with the route, could have continued to fly—there was employment opportunity there for them to fly that line. Had that happened the pilots on Western would not have been adversely affected because at the same time as Western's business shrank Western's aircraft miles shrank, the people to whom it was obligated to give employment also shrank, and it would have shrunk approximately the same proportion. [2325]

Now, United, on the other hand, accepted the route, increased its business, increased its employment opportunities, but it did not take on any additional pilots at that point. Perhaps it did at somewhere along the line, but it did not take on the pilots who were running the route.

So, had these people been transferred together with the route the adverse effect on Western's pilots would not have occurred because the number of employees would have shrunk by the same proportion as the employment opportunities. On the line of United the employment opportunities increased and the number of employees would have increased by the same proportion.

Examiner Wrenn: Well, I am not an economist, but I don't quite understand that reasoning.

(Testimony of S. Herbert Unterberger.)

The Witness: Well, I am terribly at fault if I haven't made that clear.

Examiner Wrenn: Go ahead, Mr. Kennedy.

Q. (By Mr. Kennedy): If United takes on a number of pilots and finds it has too many pilots on the pay roll, would it be the position of the Air Line Pilots Association that they should not dismiss any pilots?

A. I think the captain is better qualified to answer that.

Q. Have you anything to suggest as to what to do with any people who are dropped off the bottom of the list?

A. As an unhumanitarian——

Q. I mean in this case.

A. In 1947 the pilots on Western got a windfall. They [2326] got a route, a very desirable route——

Q. Pilots on United?

A. United, I am sorry. They got a windfall, a desirable route. They have had that route now for several years, and now if one removes the windfall —I am hard pressed to find any inequity. If I am walking down the street and I find $20 and someone comes along and says, "That is mine," and I give it to him, I haven't lost $20. That is exactly what I mean.

As I understand the testimony here, nobody is trying to claim compensation for that windfall. Western's pilots are not pressing that claim at all. Hence, the United pilots who gained a substantial amount thereby, and are now required not to dis-

(Testimony of S. Herbert Unterberger.)

gorge but merely required not to gain from here on out, that doesn't seem to me to be a disadvantage.

Q. Assuming that United is required to hire a number of pilots equivalent to the number flying Route 68, is there any social advantage in requiring them to hire the top pilots rather than the bottom pilots on the Western's list?

A. Well, let's not kid ourselves. It is not the top pilots necessarily. Some of them are the top pilots in the Western's list, as I understand it. The significant practical result, if they hire the bottom pilots on the Western list, that is an Indian giving as you can find. If they hire the pilots who flew the route it seems to me that is pretty equitable and will no doubt force some readjustments on United.

Q. Why is it Indian giving? Are the pilots on the seniority list on Western so low that they wouldn't get jobs? [2327]

A. I don't know. If you hire the bottom ones on one list and put them on the bottom of somebody else's list their chances are pretty slim.

Examiner Wrenn: Do you know Mr. Jerome D. Fenton?

A. No, I do not. I know a Fenton, but that is not his first name.

Mr. Kennedy: Mr. Unterberger made certain conclusions about the Burlington agreement, such as Mr. Fenton did before, and I don't think he is qualified to do that. I would like to note my objection to that on the record.

(Testimony of S. Herbert Unterberger.)

Examiner Wrenn: You made reference to the inapplicability of the Burlington Formula. In response to Mr. Crawford's question you said that when you were speaking of that inapplicability you were speaking of pilots, not the employees generally. Would you mind explaining to me what you mean when you say the current air line situation?

The Witness: I meant in that case the status of the air line industry as currently found.

When I get back into some of the reasons I find there is no similarity between the situation in the air lines in terms of trend of employment with the railways in 1936 when this arrangement was first worked out.

Examiner Wrenn: What did you have in mind in making this study and in using those words?

The Witness: What I had in mind was that I wanted to compare various things. I compared the trend of employment now found on air lines with the situation when the Burlington Formula was applied to the railways.

Examiner Wrenn: Did you relate the use of the Burlington [2328] Formula to any particular situation in the air lines? Did you have anything in mind, or did you just start out with an abstract idea——

A. I did several things. I found that the application to the air lines during prosperity, the application of the same formula with railroads in depression hardly seemed to be fair. The current situation of the air lines is comparable to the same thing

(Testimony of S. Herbert Unterberger.)

when the railroads found themselves in a period of prosperity. We find that the air lines system in the United States is growing, is being developed. It is a long distance from being fully developed. The railway system is an overdeveloped industry: one that is cutting back. And that has a great effect on whether you want to retire employees from the industry.

In the 1930's there was a general notion that there were too many railroad employees and this was one way of retiring them from the industry—disposing of them. The situation was quite different from the current airline industry—of an expanding industry, one that arrives a long distance off. And when we deal with the problem of national security, there was a problem of national security in the railroads in the late '30's; the current situation in the air lines was quite different from the situation to which these arrangements were initially applied.

Examiner Wrenn: You didn't have any particular situation in mind to which this was to apply?

The Witness: Any particular merger?

Examiner Wrenn: All right.

The Witness: No, sir. As I explained previously, this [2329] document was prepared initially in connection with the general problem and not with relation to either the Route 68 case or any other specific case.

Examiner Wrenn: All right. Thank you, sir.

Mr. Crawford: May I ask a question, Mr. Examiner?

(Testimony of S. Herbert Unterberger.)

Examiner Wrenn: All right, Mr. Crawford.

Q. (By Mr. Crawford): I asked you with reference to this formula, if you had only applied it to the pilots. There was one point there I thought we could clear up.

On page 3, the second paragraph, you are discussing railway labor, and in that same paragraph you say this:

> "Displacement or dismissal allowance and the other less important features of these arrangements cannot adequately compensate for the real losses suffered by these employees."

Now, in line with your first statement in regard to my question, by "these employees" do you mean these pilots?

A. Just a minute while I read this paragraph.

No, my thought there was to—I thought that was to relate that to railroad employees. That displacement and dismissal allowances very frequently were regarded by the railroad employees as not compensating for their losses in changing from the railroad industry. If the employee during his period of study and preparation was found to have run out of all of the money under the Washington agreement, and still be unable to assimilate employment in other industries, it didn't compensate. It also didn't compensate for the fact that many of them had to move their homes—the [2330] inconveniences—inconvenience of changing their lives.

Q. Well, in your research or study of this par-

(Testimony of S. Herbert Unterberger.)

ticular point you say the railroad employees were not satisfied—that, of course, applies to all employees; they are always looking for ways to improve them—but have you ever looked to any of the other executives—Mr. Hays, president of the Machinists, or Mr. Harris, chairman of the Brotherhood of Railway Clerks?

A. I don't remember discussing it with either of those gentlemen. I remember it coming up in connection with Mr. Lieserson and Mr. Burke Jewel, who was—you remember his title better than I can.

Q. He was head of the A. F. of L. employees, Railway Clerks? A. That is right.

Q. But have you ever heard of any of those gentlemen saying that they would be willing to abandon or discard this particular formula——

A. Certainly not.

Q. ——until something better came along?

A. Certainly not. If I gave you to understand it that way, I correct it. They are not dissatisfied with it, but it is not as good as it ought to be.

Q. So we are now concerned with the best formula up to date. From your comment there as to displacement and dismissal allowances, I gather from that that your one objection to the Burlington Formula, or any other formula that provides for displacement or dismissal allowance, is the particular factor you are opposed to that you don't think that that is [2331] sufficient, that dismissal or displacement should not be permitted; that the employees should be kept intact?

(Testimony of S. Herbert Unterberger.)

A. No, I am not sure that I am quite that rigid. The burden of this discussion here relates, of course, to air line pilots. I don't know about the other people. And my general thoughts in this matter is that the air line industry as it now finds itself, a growing industry and expanding industry, and so forth, is hardly the appropriate place to develop a rigid formula as to the pilots as to how you displace them and how you dismiss them, before a great many other things are done first. That is the burden of my discussion.

Perhaps ultimately when it is a mature industry and faced with the real problems the railroads were faced with in the '30's, it may be that the Burlington Formula, or something a lot better than the Burlington Formula, from labor's point of view would be quite pertinent. But the burden of this discussion is that the Burlington Formula now, in the situation that the railroads now find themselves, and the predictions from the air line industry, and the kind of predictions that don't seem inaccurate, this is hardly the place to discuss them with respect to pilots, how you cut them off from the industry.

Q. Well, wouldn't it—of course, I am not attempting to come over into the pilots part of the case. I am just wondering, though, do you advocate, then, a formula that would eliminate the compensation for dismissal provision with the pilots—do you say that that same provision should be made for other employees? [2332]

(Testimony of S. Herbert Unterberger.)

A. No, sir. I have no opinion with respect to other employees.

Mr. Crawford: That is all.

Examiner Wrenn: Any further questions?

Mr. Reilly: Yes, I have one or two questions.

Q. (By Mr. Reilly): This social cost you have been talking about, occasioned by questions of Mr. Kennedy, do you think that is an obligation that should be borne by the stockholders or the Government in this industry?

A. Well, in the air line industry it is sometimes difficult to tell where the stockholders' obligation and the Government's obligation begins. It is a subsidized industry, and the operating costs in the air line industry are borne by both people in differing proportions on different air lines. I would think that—I think the question is of less importance to the air line industry than in most places.

Q. Have you finished your answer?

A. Yes.

Q. You are familiar with the fact that in all rate cases, where you are subsidized or not subsidized, there are certain disallowances made, and depending on what side you are sitting you are happy or unhappy. What would you think about a situation like this—there is a lot of talk about subsidy and compensation, that is, cost plus the allowance for use of your property—that we would set up certain funds each month and the air line would get a check to use for that social obligation.

Now, facing it honestly? [2333]

(Testimony of S. Herbert Unterberger.)

A. Your question is really do I think that should be borne by the stockholders or the Government?

Q. Yes.

A. Let me tell you my thinking on it. I think insofar as the air line is gaining the advantage of the merger they should bear the cost. Any cost in excess of that I would have no personal objection to the Government bearing it.

Q. Suppose the merger didn't turn out just right; would the Government—bearing in mind there would be no lack of efficiency and economy in the operation of the air line——

A. You are asking me——

Q. You said first if it proved advantageous, then the——

A. No, I think you have missed my thinking.

Q. Go ahead.

A. My thinking is this—and I think we should go back to the Burlington Formula, or its——

Q. The Washington agreement.

A. Yes, the Washington agreement, for the moment. Now, I am not exactly sure what Mr. Kennedy's observation was a few moments ago, but by and large I think it is accurate to say that the principal purpose of the Washington agreement was not so much to compensate people for their losses as it was to prevent ill-founded and ill-considered consolidations, and as a matter of fact it probably had that result so far as we can tell—because you can't talk about an ill-founded situation that didn't happen. It seems to me that the kind of thing to

(Testimony of S. Herbert Unterberger.)

be done in this case is for air lines, as well as railroads, to consider the cost before they make their decision; not to make their decision and if it doesn't come out [2334] right the Government then should hold the bag. And in arriving at that decision one of the costs that should be considered, just as you consider a variety of other costs, is the replacement cost of pilots. If the merger is not economical then you wouldn't make it. If the merger on that basis is economical go ahead and make it.

Q. I want to ask you a question about pilots. I want the record to show that I love them, but there apparently in an excess number of pilots today, if what I read is true that because of larger equipment there are assertions by people who are in a position to know that one air line has let off 400 and another air line in the neighborhood of 100 or 175. Now, do you think that is setting up any critical reserve of pilots, that you have excess pilots?

Strike that question, please. Let me put it this way: What I am going to get to is, do you think that skilled mechanics are any less critical in time of national emergency than pilots?

A. Well, I don't know whether they are any less. That is a very narrow judgment—skilled mechanics——

Q. Well, you will agree that they are critical in keeping airplanes flying——

A. Oh, certainly.

Q. Not storage. A. Not storage.

Q. In making your study of the Burlington

(Testimony of S. Herbert Unterberger.)

Formula, as I understood your testimony, you made it at the request of Mr. Behncke because things were getting critical in the face of mergers and consolidations, some time late in 1947; [2335] probably after December 5, 1947.

A. No, it was late 1948.

Q. Excuse me. I thought you said late 1947. You did not make any study with respect to how it might affect employees other than pilots?

A. No, I did not.

Q. Don't you think it would be helpful to you to support the position you are taking here?

A. I would be very happy to do that.

Q. But you were not requested to do that?

A. I was neither requested nor authorized.

Q. Do you think it is a social matter that they should be treated differently?

A. Oh, they might very well be treated differently.

Q. Why?

A. I am not now familiar with the kind of problems that your machinists, and——

Q. Well, let's take it as a matter of people.

A. Well, even they may be different. And there might be preferences in terms of treatment. Some people might be quite willing to kiss the airplanes or air line industry good-bye, and others who——

Q. Apparently there are some people here who do not want to.

A. ——who would not want to, and that is perfectly understandable, too. It seems to me if they

(Testimony of S. Herbert Unterberger.)

can be classified, the best approach to the problem is to treat them in terms of their own notions as to equity.

Q. Now, you are getting down to the measuring of these [2336] costs. How can you measure the costs if you don't know, for example, what all the employees—their preferences or what is best for them? A. I think they should know.

Q. And what interest do you think the stockholders have in all of this?

A. A very substantial interest.

Q. Have you made any study of what they should receive from the air line industry in the past few years?

A. I have not made any special study, no.

Q. Do you believe they have or have not received any dividends on common stocks?

A. My general recollection is that stockholders have not done too well.

Q. Do you know of anything with respect to the law that would require them to assume the obligation of absorbing into the cost of running a United, for example, taking over pilots?

Mr. Kennedy: I object to that. I don't think Mr. Unterberger is a lawyer and knows anything about that.

Examiner Wrenn: Read the question.

Q. (By Mr. Reilly): Well, I will ask him: You studied the Washington agreement. In your studies extending over the years I assume that you have studied various labor laws? A. Yes.

(Testimony of S. Herbert Unterberger.)

Q. And you consider yourself expert on those matters?

A. No, sir; not on the strictly legal aspects of them.

Q. How about the provisions in the law? [2337]

A. I am quite familiar with the provisions in many labor——

Q. Are there any provisions which require the stockholders to make these absorptions?

Mr. Kennedy: I don't think the witness can answer that.

Examiner Wrenn: Read the question back to me.

(The question was read.)

Examiner Wrenn: I am sorry, I was thinking you had asked him, did he know of any.

The Witness: I think the railroad situation is tantamount to that, whereas a condition of merger very frequently these conditions are attached, and those have some backing——

Q. (By Mr. Reilly): You mean the Lowden case and the Railway Executive cases?

A. Yes. So the obligations in the face of those, the obligations of railroad management are pretty clear-cut.

Q. Do you think anybody who had not flown the Route 68 should be absorbed by United?

A. I don't have any opinion on that subject.

Q. Well, I thought I understood a little while ago—I may be wrong—that you said that if the pilots had been transferred as they were then oper-

(Testimony of S. Herbert Unterberger.)

ating then United would not have been obligated to take anybody else.

A. No, that is not what I said. There wouldn't have been a problem.

Q. There wouldn't have been an adverse effect on other pilots? [2338]

A. There would not have been adverse effects due to the change, to Western pilots.

Q. There is one pilot who used to work for United. Subsequently he worked for Western and then when he was recalled to duty for Western he did not report back. He flew Route 68. In that case do you think they ought to take a pilot from another route?

A. I am not prepared at this point to answer that question. That requires a pretty substantial analysis of the equities involved. Apparently that analysis is going to be made, from what I hear here.

Q. I don't know whether it is or not. Unless you have better information than I have——

A. I am alluding to the arbitration.

Q. I know what you are alluding to.

A. Some competent person is going to be required to make a value judgment of that.

Q. Would your answer be true with respect to pilots who flew Route 68 and are now flying other routes and have no desire to go to United?

A. Yes—put it this way: I have not made an analysis of that particular situation.

Mr. Reilly: That is all.

(Testimony of S. Herbert Unterberger.)

Mr. Crawford: I have one more question, Mr. Examiner.

Examiner Wrenn: You understand I am quite interested, and I appreciate the witness giving us his thinking on these things, but sometime we are going to have to bring this to a close. So let's be tempered by that in future questions.

Go ahead, Mr. Crawford. [2339]

Q. (By Mr. Crawford): You made one distinction there between the railroads and the air industry upon the point of national security, or defense, in which you pointed out that the air industry was particularly vital as a matter of defense in time of war.

It is also true, isn't it, that the railroad industry is a vital factor in the defense now?

A. Let me clarify that. I don't think you quite understood.

In the middle 1930's when consideration was given to various methods for handling this problem on the railroads, the country as a whole was not giving heavy weight to the military preparedness problem and, hence, it didn't weigh heavily then.

Examiner Wrenn: All right, gentlemen, if there are no further questions, the witness may be excused.

Thank you.

(Witness excused.)

Mr. Bennett: Shall we start with the next witness?

Examiner Wrenn: All right.

Mr. Bennett: Mr. Oakman.

Whereupon,

RONALD OAKMAN

was called as a witness by and on behalf of Air Line Pilots Association, and, having been first duly sworn, was examined and testified as follows:

Examiner Wrenn: Give your initials and address for the record. [2340]

The Witness: Ronald Oakman, 4907 Montgomery, Downers Grove, Ill.

Direct Examination

By Mr. Bennett:

Q. You are an employee of the Air Line Pilots Association International? A. I am.

Q. In what capacity are you employed?

A. Research director.

Q. You are a statistician, are you?

A. Yes, sir, I am.

Q. Would you state for the Examiner your qualifications in that regard?

A. I have been engaged in this type of work for the last six years, two years for the Air Line Pilots Association and four years in private industry. I have a degree from the University of Chicago in economics, a Bachelor's degree; a Master's degree in business statistics, the same university.

Q. Did you indicate where you had been employed the other four years of the six?

(Testimony of Ronald Oakman.)

A. American Gear Manufacturing Company.

Q. In what capacity?

A. Staff assistant in charge of sales analysis.

Q. You are sponsoring Air Line Pilots Association Exhibit No. 17, I think.

A. Yes. Well, there is some confusion about the number.

Q. Well, his is 17-A.

A. This is still 17, in that case. It was entered originally as 17. [2341]

Mr. Bennett: In that event, if the Examiner please, I would ask that that exhibit be re-marked Air Line Pilots Association Exhibit 19, for identification.

Examiner Wrenn: The one that has previously been marked as 17? It was distributed and I have a bound volume of it.

Mr. Bennett: Yes.

Examiner Wrenn: All right. Let the record show that the exhibit previously distributed and marked as Exhibit 17—and let's distinguish that from Exhibit 17-A that Mr. Unterberger identified —will now be marked for identification as Exhibit Air Line Pilots Association No. 19.

(A. L. P. A. Exhibit No. 17, for identification, was re-marked as A. L. P. A. Exhibit No 19, for identification.)

Q. (By Mr. Bennett): Where was this exhibit prepared?

(Testimony of Ronald Oakman.)

A. In my department, the Air Line Pilots Association.

Q. And did you prepare the exhibit?

A. Not personally, no.

Q. Have you made—what is the source of the material from which this exhibit was prepared?

A. There was certain historical material gained from the books and records which are listed in the bibliography at the end of this exhibit. The rest of the material was gained from questionnaires sent out to members of the Air Line Pilots Association; that is, the pilots, and their answers. And questions directed to air line management concerning the history and development of air lines, and the manner in which pilot personnel was handled in the cases of mergers, acquisitions [2342] and sales of air lines or parts of air lines.

Q. Have you made a thorough and complete study of those statistical materials on which this exhibit was compiled? A. Yes, I have.

Q. You are prepared to sponsor this exhibit?

A. I am.

Q. And to be cross-examined upon its contents?

A. Yes.

Q. Will you look at the exhibit, Mr. Oakman, and tell us, if you please, what it shows.

A. Part 1, the corporate history of the air lines in this exhibit is a compilation of the historical mergers, acquisitions, and sales that went into the building up of the air lines as they are presently

constituted. It is true that there were certain air lines that did not have too much of that in their background, inasmuch as they are small and perhaps recently organized; but the fact remains that in most cases air lines as they are now organized grew from these series of mergers, sales, acquisitions of other air lines, or parts of other air lines.

Part II, where, in connection with that first part, which is more or less of a corporate history of these various air lines, there was an attempt to list the various acquisitions or mergers as they took place. Sometimes this was a little difficult and actually there were only seven examples out of the existing 29 at the time the study was made which were outlined in detail and every transaction or change is attempted to be mentioned in this [2343] survey.

In this part of the exhibit we have attached a series of letters between the president of Air Line Pilots Association and management of United Air Lines, written about the month of January, 1940, because at that time United Air Lines was considering the purchase or merger with Western Air Lines, or Western Air Express as it was then known. This merger did not go through but these letters clearly indicate that had this merger gone through all of the pilots would have been taken into and integrated completely without loss of seniority in the United Air Lines Pilots' seniority roster.

If I could, I would like to read part of one of those letters.

(Testimony of Ronald Oakman.)

Examiner Wrenn: It is already printed here. There is no need to read it.

The Witness: I would like to call particular attention to the letter from Mr. Herlihy, vice-president of operations, that appears on pages 12 and 13.

Part II is merely a reproduction of the questionnaires, as they were answered by members of the Air Line Pilots Association concerning the question dealing with the nature of handling the employment problem among pilots created by mergers, acquisitions, or sales of air lines, or parts of air lines, and the questionnaires were directed to pilots, members of the A.L.P.A., who had intimate connection with or actually were affected by these mergers in the past.

Without any exception, these questionnaires indicate that the pilots in all cases in the past went with the line.

Part III consists of answers to questions directed to air line management, with an attempt to obtain the same [2344] information as to how management had dealt with this problem and what the precedent was in the air line industry concerning the handling of pilot personnel in mergers and sales. And though we have only four answers to our questions here, both Western and United answered this question and indicated that their policy was to take over the personnel without loss of employment or seniority rights.

Summarizing, then, this exhibit establishes that air lines, as they are now constituted, are the out-

(Testimony of Ronald Oakman.)

growth of a series of mergers, acquisitions, and sales, and that the pilot personnel involved in these mergers, acquisitions, and sales historically, and without exception, went with the line and were integrated into the consolidated seniority list.

That further illustrates that both the pilots and management were aware of this precedent that had been established in the air line industry.

That is all I have to say about it.

Mr. Bennett: You may cross-examine.

Examiner Wrenn: Off the record a minute.

(Discussion off the record.)

Examiner Wrenn: All right, we will go ahead. Mr. Crawford, do you have any questions?

Mr. Crawford: No questions.

Examiner Wrenn: Mr. Renda, you may cross-examine.

Cross-Examination

By Mr. Renda:

Q. Mr. Oakman, you indicated that Appendix III-A to the exhibit which you sponsored, identified as Exhibit No. 19, constitutes letters written by the various air lines in [2345] response to a letter from Air Line Pilots Association; is that correct?

A. That is right.

Q. I invite your attention to the letter contained in that exhibit at page 82, which was written by Mr. Kenneth E. Allen, Director of Advertising and Pub-

(Testimony of Ronald Oakman.)

licity for Western Air Lines, dated January 5, 1949.

A. Yes, I have that. That is Appendix III, though. Apparently that appendix is improperly placed in your copy of the exhibit. Appendix III is replies from air line management. III-A consists of letters from United Air Lines to Mr. Bechnke.

Q. Then mine was improperly labeled. But in any event it is the letter on page 82.

A. That is right.

Q. Who is Bruno J. Pasowicz?

A. He was director of research, Air Line Pilots Association.

Mr. Renda: Mr. Examiner, for purposes of identification, I have a copy of a letter here which I would like to have identified as Exhibit No. WX-1.

Examiner Wrenn: It will be so marked.

(The document referred to was marked Western's Exhibit No. WX-1, for identification.)

Q. (By Mr. Renda): Mr. Oakman, I first show you a letter written by Mr. Pasowicz dated December 28, 1948. It is an original. I will ask you to examine that letter and then examine Exhibit WX-1 and tell me if this isn't a true and correct copy of the [2346] original.

A. Yes, I would say that is a correct copy.

Q. True and correct copy? A. Yes.

Q. Now, is there anything on that letter of December 28—first, may I suggest——

Mr. Renda: I am going to introduce this in evi-

(Testimony of Ronald Oakman.)

dence, Mr. Examiner, so that I can question him on it.

Mr. Bennett: Is it being offered now?

Mr. Renda: No, not now.

Examiner Wrenn: It is just being marked for identification.

The Witness: Could I see that copy again?

Mr. Renda: Surely.

Q. (By Mr. Renda): Mr. Oakman, is there anything in that letter, either by letterhead or content, to indicate that this inquiry originated from the Air Line Pilots Association?

A. Aside from the fact that Mr. Pasowicz was an employee of the Air Line Pilots Association at that time, I don't know that you would have an indication.

Q. Does it indicate on the letter that he was an employee of Air Line Pilots Association, or what his position was? A. No.

Q. Isn't it a fact that anyone receiving this letter would conclude that it was a letter written not by the Air Line Pilots Association probably but somebody undertaking a study of this entire [2347] problem?

A. I imagine that would be the conclusion drawn, but regardless of who wrote the letter it was a question that gave the same answer.

Q. Don't you think it would be a fair approach to the problem if the letter had been addressed to the management of Western Air Lines and not to public relations on as serious a question as that?

(Testimony of Ronald Oakman.)

Mr. Bennett: I object to what he might think. The facts are what we are going to get at. The letter speaks for itself. It is a reply and that is all there was to it. What he thinks as to what Mr. Pasowicz did is not a proper matter in this case.

Mr. Renda: I am not concerned with whether this gentleman thinks what Mr. Pasowicz did was right or wrong. I want to establish that this was what the Air Line Pilots Association did.

Mr. Bennett: You have the letter, and you say you are going to offer it. The evidence will show that you received it and replied to it. Whatever conclusions you can draw from that, you can say.

Mr. Renda: This gentleman has drawn certain conclusions from this material, of which this is one letter, and I want to ask him the question——

Q. (By Mr. Renda): In your opinion, Mr. Oakman, don't you think a letter of this type should be addressed to management rather than the director of public relations, and when a letter is received from the director of public relations and advertising how can you attach the significance you have when arriving at [2348] your conclusion?

Mr. Bennett: Now, I submit there are at least five questions in that combination of sentences that have been set out there, and I think the questions should be asked one at a time and I should be permitted to object to them in that number.

Examiner Wrenn: You can object to any or all of them.

(Testimony of Ronald Oakman.)

Mr. Bennett: I object to it because there are more than one question in that question.

Mr. Renda: I will be more than glad to rephrase it.

Examiner Wrenn: All right. I think we are being highly technical.

Mr. Bennett: Technical because there are five questions?

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): Mr. Oakman, you have relied upon the information contained in this letter from Mr. Kenneth E. Allen, director of advertising and publicity, in arriving at your conclusion as to what Western's practice has been in the past?

A. It is substantially the same information as furnished by the pilots, however, that the pilots go with the line. It didn't contradict the information I had already had.

And, incidentally, the letter does bear his title "Director of Advertising and Publicity" on it. We didn't attempt to change his capacity in any way.

Q. But isn't it somewhat unusual that you would rely upon the opinion of the director of advertising and publicity of a company on a question which involves the policy of the [2349] company?

A. I would think he would be the person who would give that out. Various air lines have various titular heads that handle that type of information, and some air lines have different segregations than others. It is not my job to analyze that. I wouldn't attempt to.

(Testimony of Ronald Oakman.)

Q. Well, isn't it a fact that this letter was written by Mr. Pasowicz not on A.L.P.A. letterhead and in no way indicated that the point of origin was the A.L.P.A. office, was designed to solicit this information from the director of public relations and not the management of Western Air Lines?

Mr. Bennett: I submit the letter speaks for itself, if the Examiner please. Whatever the letter says, and whatever is on the letter, and whatever heading is on it, or omitted from it, it speaks for itself.

Examiner Wrenn: Let me ask this question: Would the only way Mr. Allen would have of knowing who Mr. Pasowicz is, would that have to be through personal knowledge that he might have picked up somewhere else as to the position Mr. Pasowicz occupied?

Mr. Bennett: I have no idea.

Examiner Wrenn: Do you have any idea on it, Mr. Witness?

The Witness: Well, there is a publication put out by the Government, and distributed to every organization that I know of, listing research directors and directors——

Examiner Wrenn: Well, what I am trying to get at: He would have to acquire the information from some place.

Mr. Bennett: Did they know each other? I don't know that they did, but I doubt that they knew each other. [2350]

(Testimony of Ronald Oakman.)

Mr. Renda: At any event, I offer this exhibit in evidence, Mr. Examiner.

Examiner Wrenn: It has been marked for identification.

Mr. Bennett: I have no objection to it being admitted.

Mr. Renda: I have no further questions.

Mr. Reilly: I assume, Mr. Examiner, that Mr. Bennett is going to produce the originals of all of these letters.

Mr. Bennett: We have no objection to doing that.

Mr. Reilly: And, in addition, I want the copies of the letters that were sent to United Air Lines.

The Witness: You mean the duplicates?

Mr. Reilly: I want the duplicate copy.

Examiner Wrenn: Off the record.

(Discussion off the record.)

Examiner Wrenn: All right, on the record.

Mr. Bennett: You have them, don't you?

The Witness: I have most of them here, and we can produce them.

Examiner Wrenn: I think you had better look into that overnight, because the question will undoubtedly come up at the time you offer your exhibits in evidence, and you had better give some attention to it during the evening.

Mr. Bennett: All right.

(The document heretofore marked Exhibit No. WX-1 was received in evidence.)

(Testimony of Ronald Oakman.)

Q. (By Mr. Reilly): Where is Mr. Pasowicz?

A. I don't know.

Q. Has he left the employ of Air Line [2351] Pilots Association? A. Yes.

Q. When did he leave?

A. I don't know that, either.

Q. When did you get your job? When did you succeed him?

Mr. Bennett: Please let him answer the question.

Mr. Reilly: Well, I was going to make it easy for him.

Examiner Wrenn: Go ahead.

The Witness: I had been with the organization two years ago, and I came back to them this July.

Q. (By Mr. Reilly): As director of research?

A. Yes.

Q. Replacing Mr. Pasowicz?

A. That is right.

Q. Do you know where he is employed now?

A. No, I don't.

Q. Can you tell me why Mr. Pasowicz, if you know—you came back in July? A. Yes.

Mr. Reilly: I submit, Mr. Examiner, he cannot testify to any of this material.

Mr. Bennett: Is that a question?

Mr. Reilly: No, that is a statement to the Examiner, for a ruling.

Mr. Bennett: When I offer the exhibit in evidence I assume the Examiner will pass on it. If you want to make an objection at that time, I see no objection to your doing so. [2352]

(Testimony of Ronald Oakman.)

Mr. Reilly: I can't see that the witness can even discuss it. I move to strike all of his testimony in regard to his exhibit. He wasn't in the employ of the Air Line Pilots Association at that time.

Mr. Bennett: I would like to be heard on it.

Examiner Wrenn: All right.

Mr. Bennett: If you go back to the testimony in this case by Mr. Oakman, you will find that he said he had studied every piece of material which went into this exhibit; that he had reviewed them and that he was in a position to sponsor this exhibit.

And in consequence he therefore testified regarding the exhibit. I submit that under those circumstances—and he also said he was prepared to be cross-examined upon them.

It becomes obvious, or should be obvious, that in the event of one employee leaving a company, as occurred in this instance, that an exhibit of this character would not be completely lost to a litigant if he had a party who was a competent statistician who had studied all of the material and was prepare to sponsor the exhibit.

I say that the motion to strike the testimony is not in order, and that the exhibit as offered in evidence, when and if offered in evidence, would be received.

Examiner Wrenn: Mr. Reilly.

Mr. Reilly: Mr. Examiner, these questionnaires—and, of course, I am going to object to them if they are offered—are dated in March and February of this year.

(Testimony of Ronald Oakman.)

Now, it is obvious that this witness could not have taken any part in the preparation of that questionnaire, or in the [2353] dissemination of it to these pilot council chairmen.

This study—I don't know when it was made, but it was distributed to the parties in June of this year—it is obvious that Mr. Oakman, who did not return to the employ of the Air Line Pilots Association until July, could not have studied the material and made this study. He could not have taken Mr. Pasowicz's place insofar as the studies which he set forth in his bibliography are concerned.

The various letters sent to the air lines were sent over the signature of Mr. Pasowicz. There is nothing in there to indicate they were sent on behalf of the Air Line Pilots Association.

As we know, there are articles appearing over the signatures of various people which say they are their personal views. Now, Mr. Pasowicz is not here to be cross-examined as to any of this information, and I don't think that this Board is getting information upon which you can rely can supplant the observations of the witness at the time these questionnaires were distributed and the studies made at a time the present witness was not an employee of the Air Line Pilots Association.

Examiner Wrenn: In view of the date the exhibit was distributed here, which I believe according to a letter in Exhibit I addressed to me was May 23, and the witness' testimony as to the time he came back, I am going to have to grant the mo-

(Testimony of Ronald Oakman.)

tion. I am going to allow it to stand as an offer of proof, however, and counsel can argue it before the Board, if you wish. But under the circumstances I have no other alternative, Mr. Bennett. I am not going to strike it physically [2354] from the record, but I am going to grant the motion.

Mr. Bennett: I make the offer of proof.

Mr. Reilly: Is he making the offer of proof? Because if he is I am going to respond to the offer and object to it not only as to substance but as to form. If Mr. Bennett is going to make his offer now I will answer the offer of proof now, because if it goes to the Board as an offer of proof I want my comments to go before the Board, also.

Mr. Bennett: The offer I am making is already in the record. I believe Mr. Wrenn said he would not strike it physically from the record. That is my offer.

Mr. Reilly: It accompanies the docket. It is not in the record.

Mr. Bennett: It is in this record and is not being physically stricken from it.

Mr. Reilly: The record shows that I say it is not in the record. It accompanies the docket.

Examiner Wrenn: It is not in evidence.

Mr. Bennett: You have not physically stricken it. I understand that.

Mr. Reilly: I submit the exhibit is not admissible, first, since the persons who completed the questionnaires are not here—neither the originals nor the duplicates which somebody is willing to

(Testimony of Ronald Oakman.)

swear are duplicates or original counterparts. There is no one here.

Secondly, none of the signators are present to be cross-examined with respect to whether or not they were employees of the air lines, either of the air lines involved in the transaction mentioned or that they were at the time council [2355] chairmen. There is no evidence that they were in unique position to know any of the facts with respect to those transactions. There is no evidence here that they, the signers of the questionnaires, or the witness who is now sitting on the stand, examined the contracts with respect to the transactions mentioned. There is no one present to be examined with respect to any orders which were issued by governmental agencies. I am speaking there of the Postmaster General, or the Civil Aeronautics Board, or any other comparable legislatively enacted administrative body.

The document, in the introduction and all through these documents, in the summation and various other things, there are lines upon lines of pure argument.

And, of course, since the Examiner has ruled on the motion to strike we are not going to cross-examine. But in the event that the Board overrules the Examiner then we will have the opportunity to cross-examine with respect to the arguments and statements contained in this exhibit, and I say that the originals should be submitted together with the offer of proof.

(Testimony of Ronald Oakman.)

Examiner Wrenn: All right. I believe the record is clear on it, that insofar as the Examiner is concerned the motion to strike has been granted and it will not be considered by the Examiner in any of the procedural steps that he may be called upon to carry out.

You are free, Mr. Bennett, you understand, to urge the Board to overrule me on that.

Mr. Bennett: I understand that.

Examiner Wrenn: And they may do it. And I am allowing [2356] it to go along with the record so they will have it before them, and you will have it if they do overrule me on it. Your material will be in the record if they overrule me.

Mr. Bennett: I understand.

Examiner Wrenn: In view of the ruling, are there any questions of this witness?

Mr. Kennedy: May I ask a question?

Examiner Wrenn: Go ahead.

Q. (By Mr. Kennedy): In your investigation of the mergers and acquisitions, did you ever come across one like this one, where only part of an air line had been transferred and the air line had not gone out of existence?

A. I think it is true in Western's background. T.W.A. acquired the Kansas City-Los Angeles section of Western Air. I think generally—American Airlines sold one section of its routes to another air line. I think it is generally true that sections of an air line do——

Q. One you specifically recall is Western's trans-

(Testimony of Ronald Oakman.)

fer of the Kansas City-Los Angeles to T.W.A.?

A. Yes.

Q. Do you recall any other specific one?

A. In the historical past, shall I say, air lines and routes—there were no such things as routes, as I understand them today, such as Route 68. Now——

Q. Well, now, portion of an operation.

A. I think that Eastern bought a section—but it was a small air line owned by another large air line, the New York—it is referred to here. Just a minute. [2357]

Eastern purchased from Pan American Air Lines the business of New York Air Lines, Inc. That was a segment of Pan American. It was all of New York Air Lines. It was owned entirely by Pan American, however. Now, whether you would call that a route, I would call that a route myself.

Q. Do you know of any others?

A. Those are all that come to my mind at the moment.

Q. Let's go back to the Kansas City-Los Angeles transfer to T.W.A. by Western. What was done with the pilots in that situation?

A. I think they all went with the route. All those who wanted to go with the route. There were some who elected to stay with Western Air Lines, and did so.

Q. What is the source of your information on that?

A. Pilot questionnaires. The only source I have

(Testimony of Ronald Oakman.)

on that, except that the air line has indicated that that happened.

Q. What about the situation on this New York Air Lines? What was done there?

A. I don't know whether I have a specific questionnaire on that.

Examiner Wrenn: Well, now, you are testifying from your knowledge now.

Q. (By Mr. Kennedy): What have you gathered in your research?

A. I don't know specifically. But I think they did go. I can't swear to it.

Mr. Kennedy: That is all I have.

Mr. Reilly: In light of Mr. Kennedy's questions, I want [2358] to ask this question——

Examiner Wrenn: Go ahead.

Q. (By Mr. Reilly): Do you know from your own knowledge whether United Air Lines ever operated Chicago-Dallas?

A. It seems to me they did.

Q. Well, do you know what happened to the pilots in that route when that route was given to Braniff?

A. I was under the impression that they lost that route through the 1934 fiasco, but——

Q. That is correct.

A. ——they didn't sell it or give it or anything else.

Q. Well, in some of these questionnaires you have it was the same thing. I believe you understand that.

(Testimony of Ronald Oakman.)

A. Yes. It wasn't the same thing as Route 68, you will admit.

Q. I don't admit. I am asking you the question. Are you familiar with it?

A. Not as to what the pilots did, no.

Mr. Reilly: I have no further questions, Mr. Examiner.

Examiner Wrenn: Do you have anything further of this witness while he is here, Mr. Bennett?

Mr. Bennett: No.

Examiner Wrenn: Well, now, before I excuse him I want to say to you—and I think it is clear, but I want to be perfectly clear here—that Mr. Oakman is at liberty to testify to anything that he has of his own personal knowledge and his own recollection along this line. The motion applied to the exhibit he sponsored, the testimony about the exhibit. [2359]

Mr. Bennett: I understand that.

Examiner Wrenn: I wanted you to know that.

Mr. Bennett: May we have until the morning to determine what we want to do with reference to that? But I am inclined to feel that we won't do anything.

Examiner Wrenn: All right.

If there is nothing further, you may be excused, Mr. Oakman. Thank you.

(Witness excused.)

Examiner Wrenn: We are changing hearing rooms tomorrow. Tomorrow morning it will be Room 4823 in this same building.

We are adjourned until 10 o'clock tomorrow morning in Room 4823.

(Whereupon, at 5:25 p.m., the hearing was adjourned until Wednesday, November 16, 1949, at 10 a.m.)

Received November 23, 1949. [2360]

Proceedings November 16, 1949

Examiner Wrenn: All right, Mr. Bennett, do you have anything further?

Mr. Bennett: I would like to put Mr. Oakman on. He was on the stand last night.

Examiner Wrenn: I thought I temporarily excused him, but he can be recalled.

Whereupon,

R. L. OAKMAN

was recalled as a witness on behalf of Air Line Pilots Association, and having been previously sworn, was examined and testified further as follows:

Direct Examination

(Continued)

By Mr. Bennett:

Q. You are the same Mr. Oakman who testified yesterday? A. Yes, sir.

Q. Did you make any study or investigation of the present-day certificated air carriers regarding their corporate history? A. Yes.

(Testimony of Ronald Oakman.)

When I rejoined the organization, I was assigned the duties that I had before. One of the projects was to familiarize myself with this exhibit. There is a bibliography in the back of it, so naturally in presenting it, I wanted to be sure it was correct, so I made the study of the same bibliography and verified the fact it was correct.

Q. In your investigation and study of the corporate history of the present-day certificated air lines, what did you [2365] discover, if anything, regarding consolidations and mergers that happened, if they did happen, within the organizations of these corporations?

A. I found with very few exceptions, and that is among the smaller and more recently organized lines, that the present certificated air lines are the outgrowth of a series of mergers, purchases, sales of parts or entire air lines in the past.

Mr. Bennett: May I have this marked for identification Pilot's Exhibit 20?

Examiner Wrenn: Suppose you identify it further.

Mr. Bennett: The number is all I wish.

Examiner Wrenn: I can't identify it until I know what it is. All I want is the title of it.

Q. (By Mr. Bennett): Will you look at this document and tell us what it is, please?

A. This is the original material contained in the exhibit formerly known as 17.

Examiner Wrenn: It was later marked as 19, the one you were discussing.

The Witness: Yes, sir.

(Testimony of Ronald Oakman.)

Mr. Reilly: Let us look at it. Mr. Bennett knows we have a right to see it before he asks questions.

Mr. Bennett: Will you identify it?

Q. (By Mr. Bennett): Those documents have the original signature of the individuals who sent them in? A. That is right. [2366]

Mr. Reilly: If you know.

The Witness: I am familiar with a good many of the signatures.

Mr. Reilly: You can recognize them?

The Witness: Yes, I wouldn't say every one I can verify.

Q. (By Mr. Bennett): But a great many you can. A. Yes.

Mr. Reilly: Don't put words in his mouth. Ask him how many he can.

The Witness: There are other things in there.

Mr. Bennett: These are the originals of all of the copies which are contained in Pilot's Exhibit 19?

Mr. Reilly: Before there is any testimony, I would like to test this man's knowledge.

Examiner Wrenn: Wait a minute. He has just identified them.

Mr. Reilly: He is not going to testify until we have an opportunity to examine it.

Mr. Bennett: I would take at the proper time Mr. Reilly can cross-examine this man in any regard he sees fit, is that correct?

Mr. Reilly: If you are going to offer the docu-

(Testimony of Ronald Oakman.)

ment in evidence, I have a right to examine it before any testimony is put in with respect to it.

Who was Howard V. Woodall?

The Witness: He was chairman.

Examiner Wrenn: What are you going to do?

Mr. Bennett: I am going to offer it in [2367] evidence.

Examiner Wrenn: Are you going to ask this witness to testify about it?

Mr. Bennett: I am going to offer it in evidence as being the original documents signed by these pilots.

Mr. Reilly: Is that all?

Mr. Bennett: That is right.

I will offer these in evidence.

Mr. Kennedy: I don't believe they have been given a number.

Examiner Wrenn: I think the state of the record is, if it isn't it should be that it is Air Line Pilot's Exhibit 20. I believe Mr. Bennett made that statement.

Mr. Bennett: I asked that they be identified as Exhibit 20.

Examiner Wrenn: That is my recollection.

Mr. Bennett: We will be clear it is Air Line Pilot's Exhibit 20 marked for identification.

(Air Line Pilot's Exhibit ALP-20, was marked for identification.)

Examiner Wrenn: Off the record.

(Discussion off the record.)

(Testimony of Ronald Oakman.)

Mr. Bennett: I would like to ask one or two more questions.

Q. (By Mr. Bennett): These are all of the original signed documents that you have with you in Washington and that you were able to produce this morning—the copies of which are contained in Exhibit 19, is that correct?

A. That is right. [2368]

Q. Have you examined these documents?

A. Yes.

Q. I call your particular attention to the documents received from those individuals who are pilot members of the Air Line Pilots Association. Did you make an examination of all of those documents?

A. I did.

Q. Did you make an examination of them with particular reference to the statements contained in those documents regarding what occurred to that individual when he was a party to a merger?

A. Yes.

Q. As a pilot? A. Yes.

Q. Will you tell us, please, what you discovered with reference to that particular factor?

A. I found that on these questionnaires every pilot who had answered, without exception, had testified to the effect that in mergers and consolidations the pilots had always gone with the line that had been sold, in the new consolidating company.

Q. Did these consolidations about which the pilots' statements are made—were they the same consolidations your studies indicated had taken

(Testimony of Ronald Oakman.)

place in the air line industry and in the present-day certificated corporate air carriers?

A. It doesn't mention them by name, but they are all mentioned as historical mergers in the past.

Mr. Bennett: You may cross-examine.

Examiner Wrenn: Mr. Crawford? [2369]

Mr. Crawford: No questions.

Examiner Wrenn: Mr. Renda?

Cross-Examination

By Mr. Renda:

Q. Do you know Mr. Homan, pilot for Western Air Lines? A. I have met him.

Q. Referring to A.L.P.A. Exhibit No. 21, did Mr. Homan sign that in your presence?

A. No.

Q. Do you know on what date that was signed?

A. I would say around the first of the year.

Q. Can you tell by looking at the questionnaire?

A. Not that particular questionnaire, no.

Q. Why?

A. Because there is no date there. They were sent out in January and returned in February in every instance.

Q. I show you another questionnaire allegedly signed by Mr. W. T. Homan. Can you tell me what date that was signed on?

A. No, but as I say, I say it is the first of the year.

Q. No date appears on the questionnaire?

(Testimony of Ronald Oakman.)

A. No, however, the original was filed in March, so we know it was prior to that.

Q. From this document you can't tell me?

A. No.

Q. If you please, turn to the questionnaire signed by Mr. Homan which deals with the merger of Western Air Express Corporation with Transcontinental Air Transport. A. Yes. [2370]

Q. Do you know if at that time ALPA represented pilots for Air Express?

A. They did not.

Q. There was no problem of seniority at that time in existence, was there?

A. In the present-day sense of the word, there wasn't a seniority list, if that is what you mean.

Q. And any arrangement that was made was a result of the desire of pilots to transfer with the new company and the willingness of the new company to accept them?

A. I don't know what you mean by that question.

Q. Was there anything obligatory on the part of either party that arose by any contract or any other means?

Mr. Bennett: If he knows, I take it.

Mr. Renda: Yes.

The Witness: There was nothing obligatory on the part of the pilots to go with the line.

Q. (By Mr. Renda): Was there anything obligatory on the part of the company to accept the pilots?

A. Outside of social policy and precedents, I don't think there was any, but I don't know.

(Testimony of Ronald Oakman.)

Q. Please turn to the next questionnaire signed by Mr. Homan dealing with the purchase of National Parks Airways by Western Air Express; do you know if in that case Western Air Express acquired a portion or the entire operating route or routes of the National Parks Airways?

A. I would say that they acquired a route.

Q. Was there anything left after Western Air Express [2371] acquired that route that you speak of? A. I doubt it.

Q. Isn't it a fact they acquired the entire company?

A. In that particular instance they acquired National Parks Airways.

Q. That situation is not analagous to the situation here, Route 68?

A. Do you want me to answer that question?

Q. Yes.

A. I think it is. In the first instance, when you are selling Route 68 for a given amount of money, you are not selling just airplanes or trackage. There is no way of putting a valuation on the item other than as a business. I would say that in this case, just as in the sale of Route 68, you were selling a business or a route, whichever you prefer to call it. I think that they are directly analagous.

Q. No, Mr. Oakman, in this particular case, Western sold a route and after selling that route, it still had more than 4,000 operating route miles. In the case of National Parks Airways, National Parks sold its entire route or routes to Western Air Express; there was nothing left, was there?

(Testimony of Ronald Oakman.)

A. That is true. There was nothing left to Route 68 when you sold it.

Q. Was there anything left of Western Air Lines? A. Of the other routes, yes.

Q. I don't care to proceed with that.

Examiner Wrenn: I thought you were framing a question.

Mr. Renda: I did. I would just as soon let the record [2372] stand as it is.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): Turn to the questionnaire which deals with the acquisition of Inland Airlines, by Western Air Lines. Are you familiar with that transaction?

A. Infrequently or through talking to parties who were.

Q. Do you know when the Board approved the acquisition of Inland Airlines by Western Air Lines?

A. Approved it?

Q. Yes. A. I thought it was 1944.

Q. Do you know if in that case there was a joint submission on the part of pilots of both presented by ALPA advising the Board that there was no dispute and complete agreement had been reached with respect to the dovetailing of pilots and the establishment of their respective seniority?

A. You don't know the answer to that?

Q. I am asking you if you know. I know the answer.

A. They went into Western Air Lines without

(Testimony of Ronald Oakman.)

any question, therefore there wasn't any necessity for that.

Q. Isn't it a fact that the Board withheld approving the acquisition of the assets of Inland by Western until such time as the ALPA had advised the Board with respect to agreement having been reached between Western Air Line pilots and Inland Airline pilots? A. I don't really know.

Q. I invite your attention to Paragraph (c). It indicates that there was a mutual agreement, no problem; is [2373] that correct?

A. That is right.

Q. Are you familiar or do you know that within the last 90 days a group of pilots of Western Air Lines have filed a grievance with Western Air Lines alleging that they were not a party to the mutual understanding between the Western Air Line pilots and the Inland Airline pilots and therefore they are not bound by that agreement, and as a result of that agreement, they were adversely affected in their seniority rights?

A. Am I aware of that?

Q. Yes. A. No.

Q. So I presume you are not aware of the fact that that case has been set for hearing before the Western Pilots System Board of Adjustment?

A. That is correct.

Examiner Wrenn: You mean you are not aware of it?

The Witness: Yes.

(Testimony of Ronald Oakman.)

Examiner Wrenn: All right, Mr. Reilly, you may examine the witness.

Cross-Examination

By Mr. Reilly:

Q. Mr. Renda has already asked you about the answers to the questions filed by Mr. Homan. As you note, there are no dates. Do you know why there are dates on copies submitted for the record?

A. There is a date on the first one, February 10th.

Q. What is the date on the other one?

A. They came together. [2374]

Q. Why are the others dated February 11th?

A. This was the date he sent them to us.

Q. Just a minute, please. Look at these copies. One is February 10th.

A. That is correct.

Q. What is the date on that one?

A. That is the 11th.

Q. What is the date on that one? A. 11th.

Q. Do you still want your testimony to state that they were all sent together on the same date?

A. That could be. This, of course, is his date on here.

Q. Whose are the other two dates? Are they yours? A. Here is the difficulty.

Q. Answer my question.

Mr. Bennett: Give him the opportunity to answer the question. He can't answer five questions.

(Testimony of Ronald Oakman.)

Examiner Wrenn: I would like to know what documents you are talking about.

Mr. Reilly: We are talking about the three answers presumably submitted by Mr. Homan of Western Air Lines. One of the original documents is dated February 10th. The other two have no dates, but on the copies submitted prior to the hearing there is a date of February 11th.

Examiner Wrenn: All right, now you may answer.

The Witness: I think I can answer that. It is due to oversight more than anything else. These questionnaires were pencil-written and they were sent back for the pilot to re-answer. [2375]

Q. (By Mr. Reilly): I thought I noticed one that was in pencil.

A. Not in his; in some instances they weren't.

Q. Is it your testimony there wasn't any consistent procedure for the handling of them, if you know? Were you with the ALPA in February, 1949? A. No, I wasn't.

Q. Answer the question.

Examiner Wrenn: Read it.

Do you know?

The Witness: Inasmuch as these are all typed on various typewriters which I know not to be ALPA typewriters—if that is what you mean.

Q. (By Mr. Reilly): I don't mean anything.

A. I am familiar with the fact that some of them did come in scrawled and unreadable simply because they were done hastily.

(Testimony of Ronald Oakman.)

Q. How do you know that of your own personal knowledge?

A. In investigating this question, I saw those original questionnaires.

Q. Why didn't you submit those originals as long as you submitted originals in other pencilled handwriting? A. I don't find any in here.

Q. What is that?

A. That is probably the one exception.

Examiner Wrenn: Let us get it identified in the record.

Q. (By Mr. Reilly): Tell which one that [2376] is.

A. That one came in February. It is signed by Duncan of United Air Lines.

Q. Do you want to stand on that testimony that it came in later than the others?

A. That could be the answer.

Q. Will you look at the answer——

A. As far as there being a uniform method, the idea was to get this into a neat document. That there were a few exceptions, I don't think changes that at all.

Q. You said it came in in February and that was a little later than the others.

A. Supposing I did say that, it was later than some of them.

Q. It was? A. Yes.

Q. Show me which ones it was later than.

A. The date is early.

(Testimony of Ronald Oakman.)

Q. You have made a complete study of these questionnaires, haven't you?

A. I wasn't particularly concerned about the dates.

Q. You testified in answer to a question on redirect by Mr. Bennett that you had examined these questionnaires and that every one of them, with maybe an exception, indicated that the pilots signing the affidavits, and the record can be read back to see if I am correctly quoting the question and answer, showed that that pilot went with the route.

A. Did I say everyone?

Q. No, you said there may be some exceptions, you said the pilot who signed the questionnaire had gone with the [2377] route.

A. I don't think the statement was made that way.

Q. State it. A. The record will show.

Q. State what the record will show.

A. I don't know if I am exactly capable of doing that.

Examiner Wrenn: Let us not argue the matter. Did Mr. Reilly paraphrase your testimony correctly?

The Witness: With the exception that I didn't say that every signature was identifiable by myself as being the pilot's signature in every case. That is the exception.

Examiner Wrenn: All right.

The Witness: As far as the merger and the pilots going with the line, I would say with very few

(Testimony of Ronald Oakman.)

exceptions, they indicated that the pilot did go with the line.

Q. (By Mr. Reilly): Can you find in the answer to any one of the questions a statement by the signer that he, at the time of the transaction which is the subject matter of the particular individual questionnaire, was with the air lines involved or that he, himself, had gone with the air line or had stayed back?

A. The question wasn't put that way, so naturally they wouldn't answer that way. The question was did the pilot go with the line. It was answered by people familiar with the details.

Q. Is there anything that indicates that the person who signed the document had any familiarity?

A. It says that in the opening paragraph. I would say [2378] that indicates knowledge of it. It doesn't indicate he himself was a party. In some instances they said "I was a party to this merger."

Q. Do you want to find those for me?

A. If you want to take the time.

Q. I sure do.

A. As an example, if a pilot was a member of an existing seniority line and part of an air line was acquired, he would be a party to that, would he not?

Q. Show me where any pilot says that he was involved in the transaction? Find any place in any one of these questionnaires.

A. You want me to answer?

Q. Yes, I do.

A. This man, Chaplin of Capital Route 32 left

(Testimony of Ronald Oakman.)

American because of curtailment; went with Thompson Aeronautical Corporation. Continental Airlines bought or absorbed Universal.

1929 seniority dovetail continued. 1929 left American because of curtailment. Went with Thompson Aeronautical Corporation. Seniority recommenced with them. They became Trans-American Airlines. Then again in 1935. It says left American to work with Pennsylvania Central.

Q. Find another one. A. 44.

Q. What is Chaplin in?

A. The page number is 35.

Mr. Renda: I don't have one by such name.

The Witness: Some of these boys wrote on the back.

Examiner Wrenn: Off the record. [2379]

(Discussion off the record.)

Examiner Wrenn: Is it Chaplin or McClaflin?

The Witness: Chaplin.

The next one is on page 44. Joseph B. Kuhn, counsel 51, page 44. "We were placed at bottom of the captain's seniority list in accordance with the hiring date of Ludington." That is first person. I think in every instance they refer to the pilots as themselves.

Q. (By Mr. Reilly): They will speak for themselves, won't they? A. Yes.

Q. Let me ask you another question. You didn't have anything to do with the preparation of this?

A. No.

(Testimony of Ronald Oakman.)

Q. When did you terminate your employment with ALPA prior to your recall?

A. Just a little after the transfer of Route 68.

Q. You mean the actual transfer, September, 1947? A. Yes. I left in November.

Q. November? A. End of November.

Q. Then you came back in July of this year?

A. Yes. Did you get the last one?

Q. Yes.

A. Then there is the letter from A. J. O'Donnell of counsel 10 which is page 47 in your book. That is a first-hand account. He said "In this same year we brought in a large group of Pan American Air Ferry Pilots." I think Tony was [2380] connected with Pan American at the time that these transactions took place and he was familiar with what took place.

Mr. Reilly: I won't belabor this. I believe I understand what he considers to be his personal knowledge.

Examiner Wrenn: All right.

Q. (By Mr. Reilly): Do you know of your own knowledge whether any of these, except for those which speak in the first person, had any personal knowledge of the facts on the questionnaire except as were indicated in the answers?

Mr. Bennett: I would say that the questions speak for themselves.

Mr. Reilly: I was trying to save time.

(Question read.)

(Testimony of Ronald Oakman.)

The Witness: Yes.

Q. (By Mr. Reilly): Will you amplify that? Maybe we can do it by question and answer and save time. Which of these pilots except those that indicate it in the answer to the question were in the counsel or employed with the particular air line at the time of the transaction? A. All right.

Q. For example, take Mr. Fallon. Do you know whether he was employed with United Air Lines?

A. Not at the time of some of the early transactions.

Q. On his questionnaire he refers to Mr. Behncke.

A. He does indicate some information on the matter.

Q. He suggested you get better information from Mr. Behncke—— [2381]

A. Mr. Stephenson of Western Air Lines.

Q. He has been around a long time?

A. Yes. Mr. John Murray of United Air Lines.

Q. He has been around a long time, too?

A. These are only those that I know of my own knowledge were there.

Q. That is all I wanted to know.

A. D. W. Richwine, TWA, wasn't there on some of those early transactions. I think he was on the Market Airlines deal. O'Donnell, I am sure, was there.

Q. Do you know what kind of planes they were flying? A. No.

(Testimony of Ronald Oakman.)

Q. If I told you they were flying Stinsons three times a week, would you accept that subject to correction? A. I wouldn't know.

Q. Let me ask you another question if I may. Do you know whether or not any of these signers were familiar with the contracts which were the subject matter of the transaction involved?

A. Between the two merging companies.

Q. For example, if you will look at page 62——

A. I don't think this will give that information.

Q. John Murray says "Boeing Air Transport was consolidated with United." Actually that isn't correct. It actually never was consolidated.

A. It is now.

Q. They are part of the same thing. [2382]

Did you ever have an opportunity to study the contracts which are involved in this questionnaire?

A. The sales contracts?

Q. Yes. A. Not personally.

Q. Then with respect to the study made by Mr. Pasowicz, except for the bibliography, did you ever go into the contracts of sale?

A. The fact that they sold is a published fact. You don't have to look at the bill of sale to know that we have United Air Lines that started as a different air line.

Q. It might help you as to what provisions were made for the employed.

A. I doubt it. Do you think it had them?

Q. I have seen contracts that have it.

(Testimony of Ronald Oakman.)

A. Very few contracts had provisions in them; of course, especially earlier ones.

Q. Do you know why Mr. Pasowicz has not been made available to testify?

A. I don't know except that he isn't an employee of the association any more.

Q. Do you, of your own knowledge, know why Mr. Pasowicz used an address other than ALPA to return the questionnaire?

A. I think an inferrential answer may be drawn from the testimony of Mr. Rengel.

Q. He didn't testify there was some question?

A. He indicated we wouldn't have gotten the same answers.

Q. You have an exhibit when Mr. Behncke, Mr. Patterson and [2383] Mr. Herlihy exchanged information in 1940? A. That is right.

Q. You know that Mr. Behncke has never had any difficulty in getting an answer to a questionnaire from air line pilots?

A. This was not conducted by Mr. Behncke.

Q. It was under his supervision?

A. He doesn't have time to do that.

Q. They wouldn't have been written if Mr. Behncke didn't know about it?

A. If it was a personal letter from Mr. Patterson to Mr. Behncke, you would get a right answer.

Q. Mr. Behncke doesn't have time to write letters?

A. He writes more probably than the average person.

(Testimony of Ronald Oakman.)

Q. See if you can answer this: Do you know of any instance where the ALPA has requested information from United Air Lines, from the management side, which has been denied to them?

A. I didn't mean to infer that United Air Lines really would have denied us the information. I think that I recently sent for a copy of your medal-winning financial report and got it with my own signature.

Q. They were probably very happy to send it to you.

A. It was a good one. I don't know of any instance where it was denied, but I frequently get mail myself that I don't care to answer because I don't know whether I am contributing to a real cause or not.

Q. That is our trouble with this one.

A. All of our questionnaires come to the Research or [2384] Public Relations Department and I would assume that that is where I would send a question of that nature to your company even if it were on ALPA stationery. I don't think it is misdirected. I wouldn't write to Mr. Patterson, I don't think.

Mr. Reilly: That is all I have.

Examiner Wrenn: Mr. Kennedy, do you have any questions?

Mr. Kennedy: No questions.

Examiner Wrenn: Do you have any more of the witness, Mr. Bennett?

Mr. Bennett: No questions.

At this time, if the Examiner please, I would like to offer in evidence the Exhibits 1 through 20.

Examiner Wrenn: This completes your case?

Mr. Bennett: That is correct.

Examiner Wrenn: I believe there was an indication yesterday that there would be an objection to this part of Exhibit 17 which was compiled after the——

Mr. Bennett: It was never filed in this case.

Examiner Wrenn: What do you mean when you say it was never filed?

Mr. Bennett: It was not filed previously in this case.

Examiner Wrenn: Very well.

Mr. Bennett: In that regard, I would still offer the exhibit as originally filed, and I would offer the substitute also, including the data which brings the exhibit down to date.

Examiner Wrenn: Let me ask you a question in that regard here now. I believe Mr. Unterberger prepared and you distributed to the parties Monday morning sheets on Exhibits 2 through [2385] 17, I believe it is.

Mr. Bennett: That is right.

Examiner Wrenn: Were those to be substituted for the corresponding sheets in the documents which you distributed to the parties some time ago?

Mr. Bennett: Have you the ones we attempted to substitute?

Examiner Wrenn: Yes.

Let us take the documents you distributed Mon-

day morning. The first sheet says Exhibit 2. When I look at that and compare it with the sheet marked Exhibit 2, page 3 in the volume that you distributed some time ago, they look the same to me with the exception that 1949 has been added. My question is, in this particular instance, is this sheet 2 which contains 1949 to be substituted for Exhibit 2, page 3, which you distributed originally?

Mr. Bennett: May we go off the record?

Examiner Wrenn: All right.

(Discussion off the record.)

Examiner Wrenn: On the record.

The record will show in the off-the-record discussion, Mr. Bennett was explaining the mechanics of the exhibits in regard to the question I just addressed to him.

Mr. Renda, you indicated yesterday you were going to make some objection. Would you at this time give us your specific objection?

Mr. Renda: I will be glad to.

I have no objection to substituting the new material, Exhibits 2 through 16, to the extent they duplicate only what [2386] was originally submitted and filed under date of June 7, 1949. My objection, specifically, is to the additional material which pertains to 1949 data set forth on Exhibits 2 through 16 and all of Exhibit 17.

All of this information, Mr. Examiner, is information which should have been submitted with original exhibits. If you will recall, we were prepared to go to hearing in this case in January of this year.

There was some objection to the type of exhibits ALPA had presented. After some time, some agreement was reached.

I am not able to justify in my mind any delay in making this information available to the carriers prior to the date on which this hearing was commenced. I think it is too much if we have to meet that sort of data. We are not prepared to meet it. I would like to renew my objection and move that data with respect to 1949 shown on Exhibits 2 through 16 and all data on 17 be not received in evidence, and I move that all the testimony given by Mr. Unterberger on direct or cross with respect to 1949 be deleted.

Examiner Wrenn: I would like to be clear on one thing, Mr. Bennett. Mr. Unterberger is here, and it may be we will have to call him up here if the parties want him to answer it rather than you, as to what this 1949 data consists of. As I understand it, Mr. Unterberger testified and gave certain conclusions on the basis of the material that he had submitted through 1948 originally.

Mr. Renda, of course, can agree or disagree with that. That is his privilege. What I want to be sure about is this: Is the 1949 data that Mr. Unterberger added there for the [2387] same purpose—merely bringing up to date the information that he had previously shown—or did he draw new conclusions from the 1949 data? If you want to answer or if the parties want Mr. Unterberger on the stand, I am willing to bring him back.

I would just as soon have counsel make a statement.

Mr. Bennett: The record should indicate the answer to the Examiner's question. However, Mr. Unterberger is here and I have no objection to his answering it if he will.

Examiner Wrenn: My only point is this: Is this data merely a bringing up to date of the information in evidence? I am assuming you have a stipulation circulating around here, which I haven't certainly seen, but I am sure it is in line with the usual run of stipulation; it provides for bringing certain data along or keeping it current until the Board's decision in this case. If it does, I am hard-pressed to see much difference between this and that material. Is the situation I have just stated true?

Mr. Renda: Except, Mr. Examiner, that time and time again, Mr. Unterberger referred to the trend with respect to 1949 which was new material that we were not prepared to meet. And time and time again, he made reference to Exhibit No. 17 which is the catch-all exhibit, with respect to all of the percentages. No persons have checked the accuracy and seen what the computations are.

No party should be made to meet this type of statistical data so late.

Mr. Kennedy: You are correct on the subject of the stipulation. That has been stipulated it complies with the Form 41. [2388] It has been signed by all parties. As I understand it, this data is just taken from those sources. As to Mr. Unter-

berger's mathematics, they can be checked very easily and it is not any matter that requires any testimony or cross-examination. As to his inferences, it seems to me that his testimony was such that inferences could not be drawn from the testimony. They were plain on the face of the figures.

Examiner Wrenn: What I want to be sure about is that Mr. Unterberger's testimony, as established by the statistics he introduced in 1947, 1947, is that the pilots have been adversely affected and that conclusions were based on those data. Was the addition of the 1949 data merely bringing it up to date, or was he drawing some new conclusions?

Mr Bennett: The record will indicate his conclusions on all of the data, but if you want my opinion of what his conclusions were, it was merely bringing this entire matter up to date.

Examiner Wrenn: Did any counsel understand Mr. Unterberger's testimony differently, and do you want to ask him any further question? I want the matter to be clear. My point, Mr. Renda is this: If the situation is as I have stated my understanding of it, it seems to me your objection is purely technical. I don't see that it changes the net result any. If he had different conclusions and used it for a different purpose, then your objection has considerably more weight with me.

Mr. Renda: Technical as it may be, it is still prejudicial to the rights of Western Air Lines. If we are compelled to meet on the day of the hearing data submitted to us for [2389] the first time, it is not fair.

We analyzed the exhibits. My cross-examination was limited to the years 1946, '47 and '48. I did not go into the 1949 data and I am not prepared to do so at this time. I think it is unfair if you receive this type of exhibit in evidence. I object to the receipt of this evidence for the reason that predicated on this data, Mr. Unterberger has made certain conclusions.

Time and time again he pointed to 1949 in establishing a point he was trying to prove with respect to 1946 and 1947.

Mr. Reilly: United signed a stipulation. As I understand it, the theory of Mr. Unterberger's testimony is that the pilots were affected and they continued to be adversely affected. I agree with Mr. Renda that the data should have been submitted more seasonably, but we are not going to object to the exhibit on that ground.

We do believe that United and Western should have an opportunity to submit data after the hearing has adjourned and the record be kept open if United or Western or if any party in the proceeding desires to contradict or find mathematical corrections to be made. Mr. Unterberger is good at it, but he agreed he made one error and he is liable to make one more.

Mr. Bennett: Data is always subject to be impeached by error or whatsoever, whether it is 1947 or 1949. The 1949 data consists merely of figures always in the possession of the company. Certainly if the figures are correct, the conclusions to be

drawn from it are the same in 1946 as they are in 1949.

Examiner Wrenn: Do you have any objection to the [2390] suggestion Mr. Reilly made that United and Western be given an opportunity to answer to this within a certain number of days?

Mr. Bennett: If they find something incorrect.

Examiner Wrenn: Yes.

Mr. Bennett: I have no objection. By the same token, I take it the Air Line Pilots Association would be in a position to file an answer to the very recent one that they filed, their rebuttal exhibit.

Examiner Wrenn: We can't carry this thing on forever. It has to stop somewhere.

Mr. Bennett: I would like to stop some place. There the rebuttal exhibit was filed very recently, I don't know when it was.

Mr. Renda: It was filed a month before this hearing.

Examiner Wrenn: I won't make any arrangement of that kind now.

Mr. Bennett: In any event, should they file an answer, I would be in a position to rebut that if I found their answers had errors and mistaken conclusions in it, I take it?

Examiner Wrenn: No, I am not going to have this record show any agreement to keep on filing continually one way or another. We are going to have to close it up. I asked you a question and I want an answer to that so I can reach a ruling. I seem to get the inference from you that you are not going to agree to it unless you have a right to

file something further and they will want a right to file something further, and so what have we accomplished by having a hearing if we continue debating for another year?

Mr. Bennett: I say this: If there are any errors in [2391] computation on that document, I certainly have no objection to Western or United pointing them out and drawing any conclusions from that that they so desire. I have no objection to that. I think that is their right.

Mr. Renda: Mr. Examiner, in my opinion it goes beyond the scope of errors. If these data were taken from the Forms 41, as reported here it is a matter of taking down figures. There can't be much error there. This man has testified, in my opinion, with respect to certain conclusions that he arrived at as a result of these data in 1949 and this compilation in Exhibit 17. I wasn't able to meet that. I wasn't prepared to meet that. I avoided it immediately so I could make an objection at this time. I want to stand on this motion.

Mr. Bennett: So far as the conclusions drawn to the 1949 data by Mr. Unterberger, certainly if Mr. Renda or United Air Lines can refute that in their briefs and show how the conclusions that Mr. Unterberger has drawn from the 1949 data is completely in error they can do so. I have reference only to the exhibits. I think that is the question under consideration is should the exhibits be admitted? I am asking that it be admitted in its entirety.

Examiner Wrenn: Does the presence or lack of presence of the 1949 data affect the conclusions

and the evidence of the Airline Pilots Association with respect to these exhibits?

Mr. Bennett: Only that it brings it up to date. It shows that the trend, as Mr. Unterberger said, continues the same as it started out or at least it continues.

Examiner Wrenn: Very well. Are there other objections [2392] to the exhibits?

Mr. Renda: I have another objection, not on this same exhibit, but on another exhibit.

Examiner Wrenn: Yes.

Mr. Renda: First I move that the entire exhibit not be received in evidence, Exhibit 20, on the basis that Mr. Oakman is not qualified to testify with respect to the data contained in these questionnaires. He is not familiar with the transactions——

Examiner Wrenn: I thought the only reason it was offered was that Mr. Reilly had requested yesterday in connection with Exhibit 19 that he receive the originals. I think Mr. Bennett was complying with his request.

Mr. Reilly: The difficulty there is that Bennett asked some questions with respect to it and as a result of those questions, I asked some. I am going to support this questionnaire more fully, if Mr. Bennett will concede the only reason he introduced it was because of the request I made yesterday.

Mr. Bennett: No.

Mr. Renda: I thought he called Mr. Oakman back because he wasn't able to qualify him to get the information in the case. He laid a foundation

because he studied this data and asked him what had been heretofore not allowed.

Examiner Wrenn: Is that your purpose in offering it?

Mr. Bennett: It is.

Mr. Reilly: Let me be heard on the motion in support of it.

Mr. Bennett: In support of the introduction?

Mr. Reilly: In support of the motion. [2393]

There isn't any question that inherently questionnaires are hearsay. There isn't any question in the world about that. These questionnaires have the further difficulty and the further deterrent as good evidence that they are hearsay upon hearsay because the questionnaire, if Your Honor please, is a loaded questionnaire. The questionnaire is almost filled with leading questions.

There is nothing in the questionnaire that directs the attention of the signer of the document to whether or not he has personal knowledge. The one honest thing is whether or not he or anyone in his council has knowledge. Therefore we are dealing with hearsay upon hearsay and for that reason alone, the answers to the question are objectionable. There is no identification of the signatories. Mr. Oakman says because of the result of some correspondence, he could identify the signatures.

What we are talking about are the exhibits and a study which has been prepared—the result of a witness who is not here; a witness whose failure to be present is not explained.

Examiner Wrenn: We struck all that.

Mr. Reilly: If that motion is still in effect, I will stop talking about it. I object to the receipt of the document and support the objection of Mr. Renda.

Examiner Wrenn: I don't understand your statement "if the motion is still in effect." 19 is stricken and the testimony is stricken.

Mr. Reilly: He re-offered it today.

Mr. Renda: He tried to circumvent that by this offer. [2394]

Examiner Wrenn: I didn't so understand.

Mr. Bennett: May I indicate my position?

Examiner Wrenn: All right, yes.

Mr. Bennett: As I understand the record, the exhibit which was offered was objected to and the objection was sustained.

Examiner Wrenn: That is right.

Mr. Bennett: This is not the same exhibit. These are the original statements without the conclusions as drawn by Mr. Pasowicz therefrom. These are the original statements or questionnaires, if you please, that were signed by the individual pilots and these are their signatures. It is these documents that I offered in evidence as being the original questionnaire signed by the pilots themselves for whatever they are worth in this case that I offer it in evidence at this time.

Examiner Wrenn: That is not only in compliance with Mr. Reilly's request?

Mr. Bennett: Not only, but it is also an offer of

these documents in evidence. Let me make myself clear.

Examiner Wrenn: Go ahead.

Mr. Bennett: As I understand this character of hearing, as you indicated to me yesterday, the strict rules of evidence do not hold for one thing. On the other hand, it seems to me that it would be a terrific hardship upon a litigant here to bring in these 40 pilots to Washington, D. C., and sit them on the stand and question them with reference to what happened to them in these consolidations. Maybe if we have to do that, it would be incumbent upon us to do it and maybe we would do it. These are the original documents signed by the [2395] pilots themselves and they are offered for whatever their value be upon the facts. These are their statements over their signatures. It would seem to me those facts should be in the record and the Examiner should want them in. It is for that reason that I am offering them. I still offer them.

Mr. Reilly: Mr Examiner, as I said when I started out, these are hearsay upon hearsay and I defy in any administrative proceeding which has been dealt with by any higher court for Mr. Bennett to find, as a lawyer, a case where the case was bottomed alone or substantially on hearsay evidence to which an objection has been made. These don't have as much as a jurat to them.

I don't know they were signed. There is nothing indicating they weren't signed in Chicago. There is no testimony of the knowledge. The exhibit indicates he doesn't have to have personal knowledge to sign it. The one case within my memory that

came before this Board, where the case of hearsay evidence in the use of questionnaires was laid before the Examiners in the Board with strength, was in the original Kansas City-Memphis case and the Board did not permit the receipt. The Examiner did not permit the receipt and it was sustained. If you open the door for this kind of evidence, and for the lawyer to say put them in for what they are worth, it is like hitting a man on the top of the head and saying "That didn't hurt, did it?"

I support the objection to the receipt in evidence.

Examiner Wrenn: Are there any further objections to the documents which have been tendered?

Mr. Bennett: Mr. Examiner, before you rule upon it, may [2396] we have a five-minute recess?

Examiner Wrenn: All right, we will have a five-minute recess.

(Short recess.)

Examiner Wrenn: Come to order, gentlemen. Are there any other objections to these exhibits before I rule?

Mr. Reilly: I would like to move to strike the argumentative data or conclusions which are contained in the explanatory narrative in Exhibits 2 through 16. Mr. Unterberger was present on the stand and I believe most of the conclusions might have been covered in examination, but I move to strike those parts which contain conclusions, opinion and argument.

Mr. Kennedy: What Mr. Unterberger did was to adopt those explanations as his direct testimony.

They could have gone in as direct testimony, and it seems to me they did.

Mr. Reilly: I don't agree with that, but I will abide by the Examiner's ruling.

Yesterday I moved to strike Exhibit 19. I renew that motion, and in light of the offer by Mr. Bennett, I, of course, object to its introduction in evidence.

Mr. Renda: Is that the Burlington formula exhibit?

Mr. Reilly: No, it is the study of the merger.

Mr. Bennett: Also 20.

Mr. Reilly: I have already objected to 20 for the reasons stated.

Mr. Renda: I join Mr. Reilly on that motion with respect to Exhibit 19.

Examinger Wrenn: All right.

Mr. Reilly: I have no objection to the Burlington formula [2397] exhibit.

Examiner Wrenn: Mr Bennett?

Mr. Bennett: If the Examiner sees fit to strike both 19 and 20 which are offered here, that leaves us in the position of having one phase of our case which we think is highly important without any substantiation in the record. Under those circumstances, I am going to ask that we be given time and opportunity to bring and present in this hearing a sufficient number of pilots or individuals whose experience in these consolidations and mergers can be placed in the record to demonstrate conclusively that in all consolidations and mergers, the pilots have in the past followed the route.

As I understand the purpose of filing exhibits before a hearing goes on, it is to give parties on the other side time to examine them and decide if they are going to be acceptable. Mr. Renda indicated as much so we could fortify ourselves in the event the exhibit was not going to be acceptable.

In the instance of Exhibit 19 and now 20, we had no such indication. As a consequence, we didn'tbring these pilots or individuals in to appear personally. We were taken by surprise in that regard. As a consequence, if these exhibits are to be stricken from the record, then we wish an opportunity to bring these individuals in or enough of them to demonstrate our position to the satisfaction of the Examiner. In that regard I would like the record to remain open to receive such testimony at a later date.

Mr. Renda: I am not going to say very much in reply to what Mr. Bennett has just said. I want to point out that we are going to object and object most vigorously to any move which will prolong this case any more. It has been on the [2398] docket long enough as it is. We have come to a hearing stage. The ruling should be with the thought in mind that we are going to close this case and set a date for the receipt of any data which should come in to supplement this. I certainly don't want to go through another hearing on it.

Mr. Reilly: I want to address myself to the remarks of Mr. Bennett with respect to the distribution of exhibits.

1. He, at no time, has distributed copies of ex-

hibits to me at the same time he sent them to the Examiner.

2. Mr. Bennett is apparently a lawyer and he knows or should know that the exhibits regardless of what kind of proceeding he is involved in are subject to objection because of their inherent hearsay quality.

3. The exhibits which I have addressed myself specifically to were exhibits prepared under the supervision and direction of Mr. Pasowicz. We had reason to believe—and there has never been any reason not to—that he would be available for cross-examination. He is not here. The burden of proof is upon the Air Line Pilots Association. It is conceded by Mr. Bennett at every stage in this proceeding. I want the record to show, had Mr. Pasowicz been here, he could satisfy me as to the study.

Mr. Bennett: I might make one further statement, if I may.

Examiner Wrenn: Go ahead.

Mr. Bennett: At the close of my case which would in the ordinary course of things be at the acceptance or rejection of all of my exhibits, it had been my intention to make a [2399] statement regarding another phase of this case which I think would be appropriate for me to make at this time. That statement is as follows: The Air Line Pilots Association, with insignificant exceptions, represents all of the American flag line air pilots, both continental and domestic. In this case we represent the pilots of both companies as has already been indicated in the record, United Air Lines, Western

Air Lines and Council 57 of the United Air Line Pilots.

The pilots of Western Air Lines and United Air Lines and their representing organization are all of one mind and in complete agreement on the long-established policy and the principles which these two exhibits which we are now arguing about presumes to demonstrate, that is, that the pilots follow the line in a merger or consolidation.

In this case, the United pilots and Western pilots are unalterably of this opinion. There never has been any question about the principles. We want to inform the Examiner in this case at this time that the United pilots and Western pilots have, by agreement, submitted to arbitration the question of the number of pilots and the identity of the pilots who will be recommended to be transferred in this case. This arbitration will shortly be held in Los Angeles, California. The National Mediation Board had been requested by both of these groups of pilots, Western and United, through their representative, the Air Line Pilots Association, to select a neutral referee to determine the question as between the pilot groups of the number and the identity of the pilots which they both will recommend be transferred.

Both these groups of pilots have agreed that they both [2400] have a material interest in a fair and equitable settlement of this question of how many pilots and the identity of these pilots who are going to be transferred as a result of the transfer of 68. The number they recommend will be tranferred

and their nature and character, due to the long lapse of time and the other conditions of the CAB's approval of the route 68 phase of United Air Lines can only be settled by these two groups in arbitration.

In the light of this development, which is in accordance with an action taken by the last meeting of the ALPA Executive Board, all the air line pilots' differences among themselves shall be settled in this character of arbitration. United Air Line pilots, as represented by the Air Line Pilots Association, and the United Air Line pilots' Council 57 have agreed to have this statement made and I speak for both of the groups of pilots with their specific permission and consent. I also speak for the association, the Air Line Pilots Association of which they are a part.

I was going to ask, as I ask now, for the Air Line Pilots Association, representing both groups of pilots, Western and United, including United Air Lines pilots from Council 57, that we recommend to the Examiner in this case that within 30 days from this date, we will have completed the arbitration proceedings now in progress. It is to be held on November 28, 1949, after which we will submit to you, and I might add also to Western and United, if they desire it, the arbitration decision that I have described which will inform you, and Western and United, of the number and the identity of the pilots which we recommend, both United Air Line pilots and Western Air Line [2401] pilots and the Air Line Pilots Association, be transferred as a result of the sale of Route 68.

At that time, we would urge and request that you take this number and identity of pilots and include them in your decision.

In view of that peculiar situation, I think both Western, United and the CAB and you, Mr. Wrenn, I am certain the Air Line Pilots Association are most interested that Western and United pilots come to a complete understanding between themselves with reference to how or who should be transferred if the CAB would desire to transfer them.

Under those circumstances, I request that this case be held open for a short period of time to receive that recommendation, which is impossible at the moment to make. At that time we could also bring in enough witnesses to demonstrate the point that is sought to be demonstrated by Exhibits 19 and 20, and I so ask the Examiner to allow the record to remain open to receive that testimony and also to receive the arbitrations or recommendation.

Examiner Wrenn: Are you asking me, Mr. Bennett, for an adjournment of this hearing until such time as the arbitration proceedings are settled and that the pilots will want to submit that as part of the record?

Mr. Bennett: It had not been my intention, Mr. Wrenn, to ask for an adjournment of the hearing. As I look at the arbitration, it is not a part of this case. It is a disagreement between the groups of pilots which is not a part of this case at all.

Examiner Wrenn: I want to be clear that I understand what [2402] you were doing, whether you were asking for an adjournment of the hearing or whether you were just asking for permission to file a statement as to what they agreed.

Mr. Bennett: That has been my intention and it still is my intention. I hadn't planned to ask for an adjournment in order to make that a part of the record. The CAB and Western Air Lines and United would not be bound by it. It would be our recommendation only. I wish enough time to elapse before the Examiner makes any decision in this case in order to get that recommendation.

On the other hand if the Examiner would not permit the record to remain open to hear witnesses on the question of what has gone before or what has happened before to pilots who are parties to mergers, in the alternative, I certainly would want the——

Examiner Wrenn: Let us clear up one thing. I want to go back to the last thing I said on the record to you about Mr. Oakman. Mr. Oakman can testify about anything that he knows of his own knowledge. You can call Mr. Behncke and let him testify. You can call anybody in your organization to testify about it. The only question I have is the question on those particular affidavits.

Mr. Bennett: I understand.

Examiner Wrenn: You do not understand there is any effort on the part of these other parties here to consent or to exclude any proper testimony on that from the record or to consent that it isn't

proper for the Air Line Pilots Association to make the contention that past history establishes that policy. If there is any such intention, I want the record to [2403] be clear that I am not endorsing any such idea.

Mr. Bennett: We are not prepared at this time. We have no witnesses at this time who can speak from their own knowledge as being parties. That is the point that I make. We are asking for time to bring those witnesses before this Examiner to make that point clear in the record. We want time to bring them in.

Mr. Reilly: If I may say, Mr. Oakman has testified that the pilots have gone with the route. If he testified for three days, I don't think he could say more than that.

All through your statement, Mr. Bennett, you speak about the number of pilots and identity of pilots who have been transferred from Western to United. I believe yesterday Mr. Kennedy asked if you would submit for the record the question which is to be submitted to the Board of Arbitration. Are you prepared to submit that question today?

Mr. Bennett: I might say that there is an arbitration agreement which does seek to establish as a question in the arbitration the number and the identity of the pilots and also how they shall be integrated, what their seniority shall be in the event that the Board would require their being taken.

Examiner Wrenn: Do you plan to submit copies

of that arbitration agreement to parties? Are you going to submit it for the record?

Mr. Bennett: It has not been my intention to do so.

Mr. Reilly: I am interested to know if the question submitted to arbitration presumes conclusively that United must absorb certain Western pilots. I think it is very [2404] important for this record that the question be submitted to a mediation or to the Arbitration Board and be made a part of this record.

Mr. Bennett: My answer to that is that I do not think that the differences between the pilot groups have any place in this record. As I understand it, the issue in this case to which we are all addressing ourselves is set out very specifically in the order of this Board. That issue is: Were any of the pilots of Western adversely affected by reason of the sale of Route 68 and what, if anything, should be done about it?

If there is a difference between the Western pilots and the United pilots as to who was affected and they desire to settle that between themselves and to make a recommendation to the Board, I don't understand that that is a part of this case.

Examiner Wrenn: We are not putting that in the case. It is a little different situation, isn't it, that is, the question that was addressed to the arbitration panel is a little different? We don't want controversy in here, and we are not going to try it in here. I understand it is just a simple statement of what question was addressed to you. You pro-

posed to submit the recommendation of the panel. As I further understand you, you have agreed to be bound and accept whatever recommendation the arbitration panel makes.

Mr. Bennett: That is correct. The United pilots and Western pilots are bound by the recommendations, if any, that come out of that arbitration. That is correct.

Examiner Wrenn: Where do we get in trouble with the question [2405] that is posed to the panel?

Mr. Bennett: I am not quite clear. You mean, where do we get in trouble by submitting a copy of our arbitration agreement to this Board?

Examiner Wrenn: Just the question; I am not concerned about the arbitration agreement. I am just asking about the question. You are going to give us the decision?

Mr. Bennett: Yes.

Examiner Wrenn: They want to know the question you are posing to be decided.

Mr. Bennett: I don't think it is a part of this case. I don't think it has a proper place in this case and it had not been our intention to submit it.

Mr. Reilly: Then we object to the Board receiving the decision or in any way considering it. It took me a long time to get Captain Stephenson to agree there was any disagreement. It has been two years and six months since this transaction got together. United pilots filed an intervention. It indicates there is a disagreement. They want to be here to protect their interest. There had been a disagreement or they misled the Board. Otherwise,

there was no point in their being here because Mr. Bennett could represent them.

Mr. Kennedy: I think you should require counsel for ALPA to submit both the award and the arbitration agreement at the time it is made. I don't think you can take the award in vacua. You must have the arbitration.

Examiner Wrenn: It is my personal feeling that the question was posed to them is appropriate. In the first place, I thought that I can personally require them to either submit [2406] that or the agreement. That is up to them.

Mr. Renda: I don't agree with Mr. Kennedy and we are going to oppose very strongly keeping this record open if for only one day to receive any arbitration award that the ALPA might obtain. The reason is very obvious. If there is anything that would be prejudicial to the rights of Western Air Lines, it would be that very thing. The Board is to determine whether any employees, and "employees" is not limited to pilots—ground personnel, people who are represented by the Brotherhood and CIO, have been adversely affected. I can very simply see, and it is clear to me—if I am being over-suspicious you can hold me to it—that in a situation like this where the counsel of Western pilots got together with United pilots, both of whom answer to ALPA, there can be only one conclusion, i.e., that "X" pilots were adversely affected. That is going to be the first finding. That is the most prejudicial thing that is going to happen in this proceeding.

This case was reopened as I said before for the Examiner and the Board to decide first, was anybody adversely affected. There is no doubt in my mind that the procedure which the ALPA established by trying to keep the record open—the only conclusion that can be arrived at is that certain pilots were adversely affected. That usurps the real purpose of this proceeding.

Examiner Wrenn: What is the difference between their contention?

Mr. Reilly: It is not relevant, but I don't agree with them.

Mr. Kennedy: I think both the award and the agreement [2407] and certainly the question should be made as a part of the record.

Mr. Bennett: At the time the award is made?

Mr. Kennedy: Yes.

Examiner Wrenn: I don't know. There are a lot of it's.

Mr. Reilly: Will management be able to be heard there?

Mr. Bennett: Yes.

Mr. Kennedy: What the arbitrator finds has no binding effect on the Examiner. You can examine that de novo.

Mr. Bennett: It will merely be the recommendation as to the number, the identity and the——

Examiner Wrenn: My own personal feeling is that I don't think I have the power to do that. If you submit that, you should at the same time submit to the Board the question that was posed to the panel to decide.

That is my own personal feeling.

Mr. Kennedy: The award would probably be a written award which would commence with the statement of the question.

Examiner Wrenn: Maybe it would and maybe it wouldn't. Maybe it would or maybe it wouldn't. As I understand Mr. Bennett, he has made a statement of their present intentions.

Mr. Bennett: I think I stated that there was an agreement; that the machinery to arbitrate was in the process; that the arbitration is set to be heard on the 28th day of November, and that the agreement provides that the arbitration shall be completed by the 8th of December.

Mr. Renda: I fully appreciate even if that were received into evidence as part of this record, that the Examiner or the Board wouldn't be bound by it. I appreciate that, Mr. [2408] Kennedy. Let us be realistic about that situation now. I can't see where any other course of action would be followed in the event the ALPA comes in with an arbitration award showing that 15 pilots were adversely affected than to also say "W" ground employees were adversely affected. Maybe theoretically we might argue different, but let us look at it realistically.

It will be prejudicial. Either the Examiner and/or the Board is going to decide whether they were adversely affected or they are going to rely upon a recommendation of one of the interested parties in this proceeding through a procedure of arbitration; I know at this time what the conclusion is going to be before they even start.

Examiner Wrenn: Very well.

Mr. Bennett: I am not as clear upon the conclusion of the arbitration as Mr. Renda is. As a matter of fact, I doubt very seriously if the arbitration will turn out as Mr. Renda indicates.

Mr. Renda: Will you answer one question?

Mr. Bennett: At the time we make our recommendation, we will also include the questions that were posed to the arbitrator. I don't see any objection to that.

Mr. Renda: Unless I have misunderstood, misinterpreted or wasn't listening, all your limitations have been limited to this: that the arbitration panel is going to decide the number and the identity. In my way of thinking that only poses one conclusion that you have already agreed that certain pilots were adversely affected and all you have got to decide is how many and who. [2409]

Mr. Reilly: I agree with Mr. Renda. That is the reason I asked the question about the question. We reserve the right, if it is going to be received or considered by the Board, to have the opportunity to have a hearing to reopen the matter to question the people who arrived at that or have the record of that arbitration proceeding be made available to United. That is not a request.

Examiner Wrenn: Back to Mr. Renda's question, was that a correct statement?

Mr. Bennett: That it has already been decided that certain pilots are affected?

Mr. Renda: Let us make it a simple question.

Mr. Bennett: Let me answer, if I may.

Mr. Renda: I thought you asked me a question.

Mr. Benentt: I think the record is clear as it now stands that so far as the Western pilots are concerned. They feel that every single pilot who was flying Route 68 should go with the route to United.

Mr. Renda: That doesn't answer the question of adverse effect.

Mr. Bennett: Because they were adversely affected, they should still go with the route.

Mr. Renda: That is your side of the case.

Mr. Bennett: The record substantiates that is their position. A number of years passed. In consequence of the passage of time, the United pilots are not of that opinion because there have been intervening rights. In order to alleviate, if you please, some disruption or some difficulty which might arise between United and Western Air Lines or among [2410] the United pilots which in the event that the Board would in fact require all the pilots who were flying Route 68 to go with the line, the pilots have consented to this arbitration, and I think it is highly significant that they have.

It is helpful both to United, Western and the CAB. I think it would be something that the Board should, could and would appropriately consider.

Examiner Wrenn: You are getting back to argument about that. I think I have heard enough argument on the subject.

Mr. Reilly: I have some more statements on the exhibits.

During the time of the pre-hearing conference, there were many proposed exhibits submitted by ALPA including the exhibits transmitted to you by letter dated November 14th and signed by Mr. Bennett. Attached to that letter are copies of various affidavits. I move that those exhibits, those proposed exhibits as well as any other exhibits which have been transmitted to you of which I may or may not have received copies and which have not been identified be stricken from the record in this proceeding.

Examiner Wrenn: I don't think I quite follow there, Mr. Reilly. Certainly the only documents that are going into this record are the ones which have been marked for identification here on this record and testified to either by Captain Stephenson or Mr. Unterberger or Mr. Oakman. There was some question asked about those affidavits, but those affidavits have never been identified on this record or marked as any part of them.

Mr. Bennett: That is correct.

Mr. Reilly: Have these been made part of the docket? [2411] They rest in your file.

Examiner Wrenn: No. They are in my personal files. As I understand the situation, the exhibits which have been marked for identification and which were submitted to me on or about May 23rd, at least that is the date of Mr. Behncke's letter, supplanted anything that had gone previously, and that is all that had been offered.

Mr. Reilly: Mr. Bennett was to advise us

whether or not there was available transcript of the proceedings of the Executive Board of the ALPA of May, 1947, and November, 1947, and if available, whether or not he would furnish them for this record?

Examiner Wrenn: Have you had an opportunity to look into that?

Mr. Benentt: They are not available and I am not prepared to furnish them.

Mr. Reilly: The record shows they are not available.

Mr. Kennedy: What do you mean?

Mr. Bennett: We don't have them with us. I don't know if there are such minutes, but if they are, we would not furnish.

Mr. Kennedy: Your position is even if this existed, you would not furnish them?

Mr. Bennett: We would not make them a part of the record. We see no purpose to be served in this proceeding.

Mr. Reilly: You know, Mr. Bennett, don't you, as a result of the participation of the ALPA in this proceeding, copies of all exhibits have been sent to you, and Western and United furnished all the meetings of the Board of Directors at request of Public [2412] Counsel for this record?

Mr. Bennett: No, sir, I don't.

Mr. Reilly: You haven't read the record?

Mr. Bennett: No.

Mr. Kennedy: It depends on whether you believe they are relevant. If it is your ruling they are relevant, you can't have that kind of attitude

taken from any parties. We wouldn't take it from an air line. We wouldn't take it from anybody else. I ask you to rule if they are relevant to make them available.

Examiner Wrenn: I shall not. If parties want to file a subpoena, I will take the proper action on the subpoena. Apparently that is the only way you would get them.

Mr. Bennett: If they exist; I don't know that the minutes exist.

Mr. Kennedy: I think it is a bad attitude for any party that they won't make material available unless a subpoena is asked for it. I don't see how the Board can properly function in those circumstances.

Examiner Wrenn: I will agree with you to this extent, Mr. Kennedy; from what I have heard here, they appear to be relevant. My statement comes down to requiring them to furnish it. I have honest doubts in my mind, if I said "you bring them in here" and if resisted, it would come through. That is why I say I think if some party wants to subpoena them, that is the proper method.

Mr. Kennedy: Although I think they are relevant, I don't think they are important enough to ask for a subpoena for them. It seems to me as the Examiner well knows, we have, [2413] for instance, recently gone through a case quite important where we issued inspection orders and subpoenas and we subpoenaed witnesses and documents from air lines and I think quite properly. It seems to me that there shouldn't be any exceptions

in a Board proceeding to that situation. If documents are relevant and the Examiner asks for them, they ought to be produced. That is a subject upon which as Public Counsel and generally I feel quite strongly.

Examiner Wrenn: I understand. I appreciate your feelings.

Did you say first you don't know if there are any, and secondly, you won't furnish them if there are any?

Mr. Bennett: I am not prepared to furnish them.

Examiner Wrenn: Coming to the exhibits, on Exhibits 1 through 17-A, I am going to receive them in evidence over the objection made, but I want this one condition in here. With respect to the objection made by Mr. Renda, and I am making the ruling in light of the questions I asked this morning about the 1949 data, I am going to allow him, because the exhibits were not furnished earlier when there appears to be no reason they couldn't have been made available a week or two ago at least, 15 days, time after the adjournment of this hearing to point out any errors, mathematically in them or to file any factual statement or what Western considers incorrect conclusions, not argument.

If in studying them, Western sees or believes that they demonstrate different facts, you may file such a document.

Mr. Renda: Do I understand the Examiner's ruling to be that if that document is filed it will

be received in [2414] evidence and be a part of the file of this case?

Examiner Wrenn: Yes, sir. I am affording you that rather than adjourning the hearing at this time until such time as you might feel that you would go on with cross-examination.

Mr. Reilly: I believe inadvertently you talked about Exhibit 17-A. I think we did away with 17-A and designated old Exhibit 17-A as No. 19.

Examiner Wrenn: I believe you are right.

There is no objection to Exhibit 18, therefore it is received in evidence.

With respect to Exhibits 19 and 20 for identification, the ruling was made yesterday on a motion to strike which was sustained. That ruling stands. There is one point about this situation that does trouble me, and it is not necessarily related to this particular instance. It is a situation that I can foresee that might occur in another case. That is this: Where a witness prepares a study, gathers in material and prepares a study, and through death or other circumstance, that witness isn't able to appear, there is a question in my mind about applicant being deprived of the right to make such information available.

That troubles me. I can foresee where some situation like that may occur some time. Yet, under the circumstances involved in this particular case here, I don't see that I have any alternative other than to sustain the objection to the exhibits because of the hearsay character of them. Again I want to say that they will be permitted to accompany the record as an offer of proof.

You have your right to ask the Board to overrule me, Mr. [2415] Bennett. It may do it. I permitted any question to be in there on it in the event they overrule me. I want to make clear on the record again on this point as I think I said a while ago that the ruling goes only to the objection as to the hearsay character and not to the merits of your contention.

Mr. Bennett: I understand you.

Examiner Wrenn: You are free to argue that. If Mr. Oakman testified to anything as of his personal knowledge, or Mr. Behncke can testify as to his personal knowledge as to what happened on that, I consider that perfectly proper testimony. I want you to understand, and I want the record to be clear that the sustaining of the objection to the exhibits does not go to the merits of your contention. It is not a ruling that that is an improper argument for you to make.

Are there any questions?

Mr. Renda: Was there going to be a ruling with respect to Mr. Bennett's motion that the record be held open or shall we defer that?

Examiner Wrenn: I think that is going to have to be deferred. It seems to me the more appropriate procedure would be if the agreement is consummated and if the arbitration panel does come up and set something forth, it would be more appropriate for the Air Line Pilots Association to request that it be reopened for the purpose of receiving it since

apparently there isn't any agreement here that it be reopened.

Mr. Reilly: We would prefer, from United's standpoint, that Mr. Bennett be asked that it be opened rather than leave the record open. [2416]

Mr. Renda: Western agrees with that.

Mr. Bennett: It seems to me in view of the fact that there is an agreement that they are in the process of arbitration, that is, setting up the machinery to arbitrate the matter; it is a foregone conclusion we are going to get an answer. I would prefer that the record remain open to receive it, at least the arbitration award. It will, as we have already indicated, only be a recommendation. It will not be binding.

Examiner Wrenn: I understand that. There isn't anything binding on the Board or any of the parties. You are simply going to point out what you have agreed to as a result of arbitration and what would be the position of the pilots.

Mr. Bennett: Instead of insisting at this time that every pilot on 68 who was on 68 be taken with a line, and if the Board should go along with my thinking and thereby cause a great deal of trouble on United, this arbitration is being held and I think it will completely settle the differences if any exist, upon all the questions that are pertinent. I think it is something that would be helpful to the Board and to both carriers.

Examiner Wrenn: I don't have any question on that at all. My only point is that it probably relates to better procedure from a procedural stand-

point. I am not ruling finally on the matter. I want to think a little on the matter. I have just indicated at this time what might be the better procedure.

Mr. Bennett: There is one other question I would like to clean up. [2417]

Examiner Wrenn: Proceed.

Mr. Bennett: As to the permission given to Western Air Lines to file some document or file comments regarding factual mistakes or errors that may be in the Exhibit 19 or the Exhibits 2 through 17, I wish to say this: that should be confined, I take, to only that data about 1949.

Examiner Wrenn: I want the record to show that relates to 1949 data only. I want it to be a brief. That is purely factual.

(The documents heretofore marked Exhibits ALPA 1 through 18, inclusive, for identification, were received in evidence.)

(Discussion off the record.)

Mr. Reilly: I wish to state the appearance of Charles F. McErlean, Law Director, United Air Lines.

Examiner Wrenn: Mr. Crawford, you may call your next witness forward with your case.

Mr. Crawford: I would like to make a brief opening statement.

This will save time if I point out what our exhibits are and what the nature of our testimony is.

We have filed for identification Exhibit A, Exhibit B and a supplement to Exhibit B.

When I filed, I neglected to designate them by

number or letter because I didn't know what the policy or procedure would be here, whether they would be marked numerically according to the others or not, so I later wrote a letter to you and said if agreeable, they should be marked Brotherhood of Railway and Steamship Clerks Exhibits A, B and Supplemental B. [2418]

Mr. Renda: There are just three?

Mr. Crawford: Yes.

Examiner Wrenn: They may be so marked.

(The documents referred to were marked Exhibits BRSC-A, B and Supplemental B for identification.)

Mr. Crawford: Continuing my statement, these exhibits, particularly B and Supplement to B, were prepared in accordance with our understanding of the issue to be considered at this hearing, namely, one, whether any employees of Western Air Lines have been adversely affected as a consequence of the transfer of Route 68, and No. 2, what conditions, if any, should be imposed.

Our Exhibit A is a copy of the proposed Burlington formula.

As to Exhibit B and the Supplement thereto, we have limited it only to the question of showing who we allege have been adversely affected. We made it as brief as possible so that it could be readily checked by Western.

I want it understood we have not attempted to raise any monetary claim by the reason of this exhibit. We show the nature of what we believe to

be the adverse effect. We left the question of the precise extent or degree that might flow from that particular adverse effect as a matter to be taken up with the carrier, if and when a condition is imposed. That was made up in the outline of procedure at our pre-hearing conference.

I would just like to point it out so we can have an understanding as to the limitation.

It says: "It was agreed that the term 'any' employees [2419] as referred to in the Board's order does not mean a specific number. The opinion was expressed that a showing of adverse effect to one employee would meet the provision of the Board's order. Public Counsel pointed out the possibility that if only one person were affected the Board might consider de minimis and that no Board action would be required."

It was also pointed out there, and I think I understand, that we do propose to show that employees have suffered consequences but do not propose to go into the question of the names of individual employees and the measures of individual adverse consequences and settlement of individual problems. Those problems will be taken up later if and when a formula is to be provided.

It would be only fair at this time to raise that point with the carrier in order to let them have an opportunity in this conference or bargaining, as we call it, to express himself if a condition is imposed.

I want it understood that these exhibits are limited to showing what we believe the issue of

whether these certain employees have been adversely affected to be. It is nothing more.

Mr. Renda: I would like the record to clearly show that here has been no agreement reached or entered into between the carrier and the BRC with respect to whether any employees were adversely affected or as to what should be done should the Board so find.

Whereupon

LYLE McKINNEY

was called as a witness on behalf of the Brotherhood of Railway [2420] Steamship Clerks, and having been first duly sworn, was examined and testified as follows:

Examiner Wrenn: Give your name and address to the Reporter.

The Witness: Lyle McKinney. My office address is 7688 Pacific Electric Building, Los Angeles, California.

Direct Examination

By Mr. Crawford:

Q. What position do you hold with the Brotherhood of Railway Clerks?

A. I am a Grand Lodge representative.

Q. What offices have you held in the past, before the office you now hold?

A. Formerly, I was an organizer in the field for a number of years. I was then during the war years our national legislative representative here in the City of Washington handling our cases before

(Testimony of Lyle McKinney.)

the National Mediation Board, the War Labor Board and the Railway Labor Panel.

Following that, I was in our Cincinnati headquarters as Chief Clerk to Grand President Harrison, and then I returned to the field in the organization and negotiation of contracts in the western part of the U. S.

Q. Were you, during that period of time, the acting General Chairman and later the General Chairman for the Brotherhood on the property of Western Air Lines, Inc.? A. That is correct.

Q. Were you holding that office at the time you conducted your investigation and negotiations on that property? A. That is correct. [2421]

Q. I would show you, at this time, Brotherhood's Exhibits A, B and the Supplement to B. The Examiner has the original. I will ask you to examine those and ask you if you sponsor those exhibits on behalf of the Brotherhood? A. Yes, I do.

Q. Were they prepared under your supervision and direction? A. That is correct.

Q. Did you personally participate in the investigation and the preparation of the material that represents the contents of those exhibits?

A. I did.

Q. Would you state what they represent, particularly B and the Supplement to B? We think we know what A is.

A. The original B we obtained in November, 1947. The Supplement was acquired approximately a year later in order to comply with the request

(Testimony of Lyle McKinney.)

of Public Counsel for additional information regarding the present employment of the individuals whom we have named.

Q. After you prepared your material which went into that exhibit, did you have an opportunity to check your exhibits with Mr. Renda or any representative of Western Air Lines?

A. Yes, Mr. Renda and I had conferences over these individuals named here. The information contained was approximately correct.

Q. What I mean is: You gave Mr. Renda or someone at Western an opportunity to check the information you had with their records?

A. Yes, Mr. Renda was checking it. [2422]

Q. You say as the result of that conference for checking purposes, you found the record substantially correct at that time? A. That is right.

Q. What is the source of the information which you based the contents of those exhibits on?

A. Personal interviews—by correspondence and then later by personal interviews with the individuals.

Q. Will you explain how each employee is shown to be adversely affected? Take on Exhibit B the third item and explain it.

A. Some were furloughed when their position was abolished. Others had services terminated. Others were transferred through exercise of seniority or transferred to other locations.

Q. Directing your attention to the bottom, starting with Mr. Jacobs—those do not represent fur-

(Testimony of Lyle McKinney.)

loughs, but transfers from San Francisco to the city designated, and moving expenses and so forth, is that correct? A. That is correct.

Q. The third item sets out the nature of the alleged adverse effect? A. That is correct.

Q. You do not purport to set forth all of the employees that may have been adversely affected. This is a representative group, is that correct?

A. That is correct.

Q. I want to call your attention to the fact that I believe that just recently in conference with me you called [2423] attention to what was evidently an oversight in the checking back with Mr. Renda. There was apparently a conflict in the record, I believe it shows, to the disadvantage of Western Air with reference to Mr. Toomer.

Directing your attention to the Supplement to Brotherhood "B" what I had in mind, Mr. McKinney, is to have you explain it. We show the record service of Mr. Toomer of December 1, 1945, and apparently he was furloughed from September 18th and then rehired on the 25th. I think you called my attention to your notes. You referred to the material covering Mr. Toomer. A letter was directed to him notifying him of his furlough. That stated the date to be September 14th. In other words, Mr. Toomer was on the pay roll four days longer than that?

A. That is correct. The letter which Mr. Toomer received from the company advised that owing to the disposition of Route 68, he would be

(Testimony of Lyle McKinney.)

furloughed effective as of September 14, 1947. However, Mr. Toomer advised me that he remained in the service until September 8th. He worked four additional days after the September 14th date.

Q. While we are speaking of Mr. Toomer, probably one item can explain another. I call your attention to "Compensation Prior to Transfer, Termination or Furlough." It shows Mr. Toomer at $1.12 an hour. It shows he was rehired on September 25th, and it shows his present compensation is $1.12 an hour. It shows he didn't suffer a loss of salary. What is the adverse effect?

A. Mr. Toomer actually lost a week's pay. He was off the pay roll from September 18th through September 25th. He [2424] returned to service on September 25th.

Mr. Crawford: The letter that we spoke about shows September 14th and it should be September 18th.

Q. (By Mr. Crawford): That also applies, Mr. McKinney, to Mr. Jacobs and others where the salary shows before and after. I refer to those employees below Toomer. They were transferred from San Francisco to Denver. Their loss was not a change in the salary. They lost the time going from one city to another, is that right?

A. That is right.

Q. There was one other question which Mr. Reilly of United asked me, and I would like to have you state it. It is not the position of the Brotherhood in this particular case to urge that United take

(Testimony of Lyle McKinney.)

over any employees of Western, is that correct?

A. That is correct.

Q. To the best of your knowledge, the statements contained in Exhibits A and B, and Supplement to B are true and correct to the best of your knowledge? A. That is right.

Mr. Crawford: I would like to offer in evidence Brotherhood's Exhibits A, B and Supplement to B.

Examiner Wrenn: I will defer a ruling until cross-examination has been concluded.

Off the record.

(Discussion off the record.)

Examiner Wrenn: Let us recess until 2 o'clock.

(Whereupon, at 12:40 p.m., the hearing adjourned to reconvene at 2 p.m. the same [2425] day.)

Afternoon Session—2:00 P.M.

Whereupon,

LYLE McKINNEY

was recalled as a witness on behalf of the Brotherhood of Railway Steamship Clerks, and, having been previously sworn, was examined further and testified as follows:

Examiner Wrenn: Mr. Bennett, have you some questions?

Mr. Bennett: I have no questions.

Examiner Wrenn: Mr. Renda, you may examine.

(Testimony of Lyle McKinney.)

Cross-Examination

By Mr. Renda:

Q. Mr. McKinney, on what date was the Brotherhood of Clerks—and Mr. Examiner, I presume it is alright to refer to this organization as the BRC or Brotherhood?

Examiner Wrenn: That is alright.

Q. (By Mr. Renda): On what date was the BRC certified as the bargaining agent for the class and craft that you represent in this proceeding?

A. The certification was issued by the National Mediation Board on September 9, 1947.

Q. What, in your opinion, constitutes adverse effect to an employee?

A. Well, he may be adversely affected in several ways. He may be terminated, furloughed, transferred to a less lucrative position as a result of a senior employee displacing him.

Q. Generally, would you say it is something that can be measured in dollars and cents? [2426]

A. I think so, generally.

Q. Aside from what we all recognize is the inconvenience that may result in transferring one employee from one domicile to another?

A. Yes. That is right.

Q. On direct, this morning, in reply to a question by your counsel, you stated that you had conferred with me with respect to your exhibits in this case and that I had agreed that the record was substantially correct. A. No, I didn't say that.

(Testimony of Lyle McKinney.)

Mr. Crawford: I want to correct that. I didn't want him to state that. I think he said it was his understanding that the records were substantially correct in their checking. I don't think he said you agreed to that. I don't want to infer that.

Mr. Renda: Just so we have it straight for the record.

Q. (By Mr. Renda): I understand your testimony was that you understood that the data set forth in your Exhibits B and Supplemental B, were substantially correct? A. That is correct.

Q. Are there any other employees that you know of that are represented by the BRC which were adversely affected, allegedly, by reason of the sale of Route 68, other than the employees mentioned in Exhibits B and Supplemental B of the BRC?

A. I know of one other right offhand.

Q. What is his or her name?

A. His name is Kenneth Cassidy.

Q. How was he allegedly adversely [2427] affected?

A. Similar to Mr. Toomer. He received the letter from Mr. Eastman stating that due to the disposal of Route 68, it wouldn't be necessary to have the highly departmentalized departments over there and he would be furloughed effective September 14th.

Q. Do you know what happened to Mr. Cassidy?

A. Yes, sir.

Q. Will you please tell us?

A. Mr. Cassidy requested the right to exercise

(Testimony of Lyle McKinney.)

his seniority to another station. He was offered that opportunity on September 23rd. That same day, by virtue of the other men having transferred out of Denver, Mr. Cassidy was permitted to resume service in Denver.

Q. So that he was re-employed by Western and is still in the employ of Western Air Lines, is that correct?

A. Well, partially. He was re-employed, but he has since terminated.

Q. He has since terminated? A. Yes.

Q. Do you recall when that was?

A. April 15th.

Q. Of this year? A. Of this year.

Q. So that aside from the names which are listed in your Exhibits B and Supplemental B and Mr. Cassidy, that represents all of the people that you know were allegedly adversely affected?

A. Up to this time.

Q. Refer to Exhibit B and Supplemental B. I have several [2428] questions to ask you with respect to each employee that you have listed.

First, I refer to Miss Bower. She was terminated on what date? A. August 16, 1947.

Q. That was prior to the transfer of Route 68?

A. That is correct.

Q. Mr. Callahan was terminated on what date?

A. August 20, 1947.

Q. That also was prior to the sale of Route 68?

A. That is correct.

Q. Mr. Chelf, you show as "Services terminated." Do you know what happened to him?

(Testimony of Lyle McKinney.)

A. Yes, I do.

Q. He was transferred to Las Vegas, was he not? A. That is correct.

Q. Do you know on what date he was transferred?

A. No, I couldn't tell you the date he was actually transferred over to Las Vegas.

Q. Our records indicate, Mr. McKinney, he was transferred to Las Vegas on September 24th, and there was no time lost. Do you have any dispute with that information? A. No, I don't.

Q. The next person is Mr. A. R. Elliott. You indicate his position was abolished. Do you know on what date he was terminated?

A. September 2, 1947.

Q. Do you know that subsequent to September 2nd, and in the same month, he was offered a position with Western [2429] Air Lines and rejected it and went to work for Monarch Airlines?

A. No, I don't know that.

Q. Next, let us consider Mr. James Glaze. He was terminated as of what date?

A. September 19, 1947.

Q. When I say "terminated" I mean furloughed. We are in agreement on that, are we not?

A. That is right.

Q. As such, he would have a right to exercise seniority rights? A. That is right.

Q. Where I use "terminated," it is synonymous with furloughed. A. That is right.

Q. Do you know what happened to Mr. Glaze?

A. Yes, Mr. Glaze was offered a transfer to

(Testimony of Lyle McKinney.)

another station and he declined the transfer.

Q. That is right. He was offered a job at San Francisco, Western Air Lines? A. Yes.

Q. He declined the transfer? A. Yes.

Q. He is now in the employ of United Air Lines.

A. I don't know.

Q. He was offered a job in San Francisco by Western and rejected it? A. That is right.

Q. Look at Miss Lisco, and tell what date she was given [2430] notice of furlough.

A. She was also furloughed August 16, 1947.

Q. There, again, that was before the sale of Route 68. Let us consider McAndrews. He was furloughed as of what time?

A. September 14, 1947.

Q. Do you know that Western offered McAndrews a job at San Francisco and was rejected?

A. No, I did not.

Mr. Crawford: As of what date was he offered that?

Mr. Renda: September 23rd.

I might indicate on these where there seems to be a conflict, I propose to introduce evidence on my direct case.

Examiner Wrenn: I assumed you were going to take care of that.

Mr. Crawford: On what date was Mr. McAndrews offered the transfer?

Mr. Renda: 23rd of September.

Q. (By Mr. Renda): You show Rohan with the remark "Probably reduced." Isn't it a fact he

(Testimony of Lyle McKinney.)

wasn't furloughed, so his name should be deleted?

A. Yes, his name should be deleted.

Q. The next gentleman is Sevik. When was he furloughed? A. September 14, 1947.

Q. Wasn't he offered a job by Western in San Francisco and he rejected it?

A. That is correct.

Q. The next is Miss Tomlin, when was she furloughed? [2431] A. August 15, 1947.

Q. That was before the sale of Route 68?

A. Yes.

Q. The next is Toomer. You testified this morning that he was re-employed by Western. I don't recall the date that you gave.

A. He was supposed to have been furloughed as of the 14th, but he worked four additional days and he was offered a transfer to another station on the 23rd of September, and at that same time the Denver positions were available, so he was re-employed in Denver.

Q. If you know, isn't it a fact he was offered re-employment prior to the 23rd and the station was Casper, Wyoming, and he chose to wait to see if an opening would develop in Denver?

A. It was Casper, but it wasn't offered him until September 23rd.

Q. That is correct.

A. After he had been out of service since the 18th.

Q. But he didn't resume his employment until the 25th? A. Yes.

(Testimony of Lyle McKinney.)

Q. But he could have resumed employment at Casper on the 23rd? A. That is right.

Q. We are in agreement.

Next, let us consider Mr. Young. On what date was he furloughed? A. September 14, 1947.

Q. And do you know that he was offered a job by Western [2432] at both Los Angeles and Denver and rejected both?

A. Well, that is not exactly correct. He ultimately accepted a position in San Francisco and worked there over a year. He went out there in the latter part of the month of September, as I recall. Pardon me, it was after that.

Q. But prior to the time he accepted employment at San Francisco and subsequent to his having been furloughed, he was offered and rejected employment at Los Angeles and Denver.

A. That is correct.

Q. The next Elliott is the same as we have considered before? A. Yes.

Q. He appears twice? A. Yes.

Mr. Crawford: We listed those as showing those that had gone to another employer.

The Witness: I would like to say this in connection with Mr. Elliott, that Mr. Elliott personally told me that he had made a request for transfer to some other station and he never heard anything from it and it was necessary that he take a position with Monarch Airlines in order to get back to work.

Q. (By Mr. Renda): Do you happen to have

(Testimony of Lyle McKinney.)

any written evidence of any letter he wrote Western to which he did not receive a reply to, Mr. McKinney? A. I think I have it with me.

(Discussion off the record.)

The Witness: Here is the original. [2433]

Q. (By Mr. Renda): Mr. McKinney, you have shown me a letter addressed to "To whom it may concern," signed by Mr. Elliott in response to my previous question. My question was whether or not you have in your possession, you may or may not, a copy of any letter written by Mr. Elliott to Western Air Lines or any official of Western Air Lines with respect to his desire to transfer to another station.

The reason I ask is that our records indicate that no such letter was ever received. There was no desire on the part of this employee to transfer elsewhere. A. Here.

Q. It is your testimony, then, that Mr. Elliott did write to Western Air Lines and asked to be transferred elsewhere as evidenced by a letter in your possession? A. That is right.

Mr. Renda: Off the record.

Examiner Wrenn: Off the record.

(Discussion off the record.)

Examiner Wrenn: On the record.

Proceed, Mr. Renda.

Q. (By Mr. Renda): Let us proceed to the next person, Mr. Jacobs. Our records indicate, Mr.

(Testimony of Lyle McKinney.)

McKinney, that Mr. Jacobs was transferred to San Francisco and that there was no time lost.

A. There was no salary lost, but Mr. Jacobs paid his own fare from Denver to Salt Lake City and Western Air Lines furnished him transportation from Salt Lake City to San Francisco. He paid for the moving of his furniture from [2434] Denver to San Francisco.

Q. Do you know if Mr. Jacobs has, at any time, submitted any claim to Western Air Lines to be reimbursed for his transportation from Salt Lake City to Denver and for the cost of moving his household effects? A. No, I don't.

Q. Have you any idea as to what that claim might amount to in dollars?

A. Yes, for my own information, in contacting Mr. Jacobs, I had him give me an affidavit as to what expenses he had been put to. I hadn't intended to use this in any hearing back here. It was for my own information in contacting the employees that I got the information. It was my intention to use that back on the property.

Examiner Wrenn: Why don't you give him the amount?

Q. (By Mr. Renda): Give the amount.

A. He had $154.50 moving expenses on his household goods between Denver and San Francisco and he didn't state the amount of the fare that he paid for his trip from Denver to Salt Lake City.

Q. Mr. McKinney, you are familiar, I presume,

(Testimony of Lyle McKinney.)

with Western Air Lines' policy with respect to paying for moving expenses and transportation cost of employees that are involuntarily transferred from one station to another?

A. I am familiar with that which is contained in the current labor agreement.

Q. Isn't it a fact that with respect to Mr. Jacobs and a few others that I will query you on, that I personally, and [2435] perhaps others of the company have said to you in the past, that if you will submit a claim on behalf of these men who have not been reimbursed totally for moving expenses that I am fairly certain that management will honor them?

A. You made that statement to me very recently, just before we came back here for this hearing.

Q. Let us look at Mr. Moore. I presume the same situation holds with Mr. Moore as with Mr. Jacobs. He was transferred to San Francisco and there was no time lost.

A. Mr. Moore was furnished transportation from Denver to San Francisco, but he lost salary from September 14th to October 1st, the date he resumed service in San Francisco.

Q. Our records indicate that the date of his transfer was September 27, 1947, and that there was no time lost in actually being off the pay roll.

A. He was furloughed as of September 14th.

Q. Where was he employed at the time he was furloughed? A. Denver.

(Testimony of Lyle McKinney.)

Q. According to your information, when was he recalled to duty?

A. October 1st, in San Francisco. I will clarify it to this extent: Mr. Moore told me that when he was notified of the availability of a position in San Francisco for him, he then asked to have three days in which to get his business cleared up in Denver so that he could move.

Q. Are you familiar with the letter that Mr. Moore wrote to Mr. Frank Eastman, Western Airlines, dated September 23rd, which I will introduce as part of my direct case, which indicates that on that date he had received a telephone [2436] call and had accepted the offer to transfer to San Francisco and he requested time in order to clear up his own personal business before making the transfer?

A. That is correct.

Q. Let us consider Mr. Pope. Did he lose any time in transferring from his former station to San Francisco?

A. Mr. Pope drove his own car out there. He moved by his own personal automobile and he was not reimbursed for traveling expenses.

Q. He lost no time? A. He lost no time.

Q. If Mr. Pope will present his claim, the company, pursuant to its policy, will pay that claim.

Examiner Wrenn: Was that a statement or a question?

The Witness: I thought you were making a statement.

Q. (By Mr. Renda): I represented that I would pay it?

(Testimony of Lyle McKinney.)

A. You represented you would pay traveling expenses and traveling loss, but not for any specific individual.

Q. I have made the general representation to you in the one conference we have had or two that anyone who had sustained loss by not being totally reimbursed for traveling expenses or moving expenses by reason of transfer, should offer such claims. A. That is right.

Q. How about Mr. Ross? Is that also a case where there was no time lost and it is a question of moving expenses?

A. Yes. He was transferred to Los Angeles.

Q. How about Mr. Swift? [2437]

A. Mr. Swift lost four days' salary and he also drove his own car out for which he was not reimbursed.

Q. With respect to those employees that are set forth in BRC Exhibit B and Supplement B who have returned to the employment of Western Air Lines subsequent to having been furloughed on or about the time of the sale of Route 68, is there any need for the consideration or application of the Burlington formula provided they are reimbursed for moving expenses and whatever time was lost?

A. For those employees that we know of now who were affected as a result of the sale, that is quite true, there would be no need for the Burlington formula.

Q. What is your position with respect to these employees that were furloughed, for example, on August 16th or 17th, which was nine or ten days

(Testimony of Lyle McKinney.)

prior to the Board's decision and which was one month prior to the actual transfer of Route 68? Is it your opinion that they were adversely affected?

A. Yes, I believe so. Specifically the three girls: Bower, Lisco and Tomlin were passenger supply clerks. The flights were taken off and the entire department was abolished.

Q. They were released at the same time that Western effected a reduction in its schedules on Route 68 or subsequent thereto. In other words, at one time we had four round trips and in August it was reduced to two? A. Yes.

Q. As a result of that reduction, they were furloughed. Supposing the sale of the Route 68 had not been approved and Western had continued to operate it with two schedules, would [2438] it have been necessary to recall these people? They were furloughed on August 16th or 17th.

A. It may or may not have been. It all depends on whether Western was going to handle their commissary business on a contract basis with another carrier as they did. Up there for the little remaining commissary work that there was there to be done, had they not have sold the route—I am not so sure that they might have contracted out.

Q. That raises a very interesting and important question which I believe is germane to the issue in this proceeding. Assuming that at Los Angeles, at the present time, Western were to enter into a contract with Pan American, whereby Pan American would perform all of Western's work on the airport

(Testimony of Lyle McKinney.)

just as now do for Pan American, and as a result thereof, it would be necessary to release, furlough or terminate a number of Western employees; do you think under those circumstances that those employees would have any claim for compensation on any basis?

A. Not on the basis of this here, and now we have an agreement in effect covering the craft and class. We would be faced with a scope violation of the rules of agreement.

Q. As I understand your testimony, in this hypothetical situation which I put to you which I represent as being somewhat analagous to the August 16th situation pertaining to Miss Bower, that if that were to come about, you would take the position that jobs should still be made available for those employees?

A. I would take the position that the company would not have the right to transfer any work out from under the scope rule [2439] of that agreement except by agreement with the organization.

Q. If that is the case, how can you ever effect any economies through consolidations, mergers and otherwise if after there has been such a consolidation the carrier is precluded from releasing or furloughing the employees which are then unnecessary?

Mr. Crawford: Mr. Examiner, I want to object to that question as argumentative and simply calling for a conclusion. It has nothing to do with this particular issue.

Examiner Wrenn: I grant you that, but if Mr.

(Testimony of Lyle McKinney.)

McKinney wants to philosophize as to his personal feelings, I will let him go ahead. You are entirely correct. I don't see what bearing it has on the particular issue.

The Witness: I don't mind stating that there would be no need of having an election and certification as a representative if the company can take the work away from the employees that have been certified to perform the work.

Q. (By Mr. Renda): Isn't it a fact that the reason the BRC strongly urges the Burlington formula in this proceeding is because it is designed to freeze employees in their employment——

A. No.

Q. ——and preclude a carrier from furloughing or terminating an employee when exercising certain economy measures?

A. No, that is not correct.

Q. On August 16th, Miss Bower and on August 17th Miss Callahan were terminated. This was prior to the sale of 68, prior to the Board's decision, prior to the transfer. [2440] It was due to a schedule cutback. How were they adversely affected by the sale?

A. If you can prove that, then they would be eliminated. However, the rumors were rife all over the property at the time that the sale was going to be approved and that the entire commissary department would be abolished as a result of the sale.

Q. Turn to your Exhibit A which is a so-called

(Testimony of Lyle McKinney.)

statement of the Burlington formula. It is the BRC's position that in the event the Board were to find that certain employees belonging to the class and craft you represent were adversely affected, that the applicable remuneration provision is one which should be borne by both Western and United or by just Western or just United.

A. I will leave that up to the Board to decide.

Q. You have no position one way or the other?

A. No.

Examiner Wrenn: There is no question anywhere that this Exhibit A is the Burlington formula?

The Witness: That is right.

Examiner Wrenn: Proceed, Mr. Renda.

Q. (By Mr. Renda): With respect to these employees that were transferred and are still in the employ of Western, you make no claim for displacement or disallowance compensation?

A. Those that are still in the service?

Q. Yes. A. No.

Q. Your claim, if any, is limited with respect to [2441] displacement, those who have accepted other employment which may be less in payment from what they were previously receiving.

A. It could be that way. As a result of displacement rights, certainly employees at the bottom of the roster, wherever they might have been located in the system, were affected if they were displaced and placed in a furlough status.

Q. You are aware that in the air line business

(Testimony of Lyle McKinney.)

there is no such thing as permanency of domicile with many classes of employees. You recognize that to be a fact, do you not?

A. Among the younger employees that might be literally true, but not in all cases.

Q. Don't you feel that the application of a provision such as is set forth on page 6, which deals with sale of property or compensation for settling lease-hold interests and et cetera, would tend to preclude a carrier if it were saddled with such a condition from the freedom it requires to move people from one station to another?

A. Are you talking as a result of sale or in the normal application of the exercise of their seniority under the agreement provisions?

Q. Let us take them one at a time, as a result of the sale of the route, what do you think about that?

A. I think they are entitled to a reasonable amount of protection in the sale of a route.

Q. Let us take, for example, a case of an employee in Denver who bought a home in 1942 and was then, as a result of the sale of Route 68, transferred to San Francisco. He [2442] had to sell his home in Denver. Is it your opinion that the Burlington formula with respect to that provision only would apply in the event he sustained a loss on the sale of his property?

A. If the Board adopted that provision.

Examiner Wrenn: Read the question, please.

(Question read.)

(Testimony of Lyle McKinney.)

Q. (By Mr. Renda): I am asking for your opinion.

Examiner Wrenn: He answered it. Read it.

(Answer read.)

Q. (By Mr. Renda): What would you recommend to the Board with respect to that situation, that they should or should not adopt it in that case?

A. We have recommended the formula here, haven't we?

Q. So then I am to conclude that your answer would be yes?

A. If the employee suffered a loss in the sale of his house, I think he should be reimbursed by the company.

Q. What if the employee sustained a gain, should that be turned over to the company?

A. No, I don't think it should be turned over to the company.

Mr. Renda: No further questions.

Examiner Wrenn: Mr. McErlean, you may examine.

Cross-Examination

By Mr. McErlean:

Q. Mr. McKinney, has the BRC been certified as the [2443] representative of any of United's employees? A. No, sir.

Q. Has the BRC ever claimed to United that it represent any of its employees?

A. They have not.

(Testimony of Lyle McKinney.)

Q. Do you now, in this hearing, claim to represent any of United's employees?

A. We do not.

Q. Turning to your Exhibit A, on the first page thereof, about the fourth line in paragraph No. 1, you request that the Board apply this Burlington formula to an employee of either carrier. Do you make that claim against United, or this formula you are proposing to apply only against Western?

A. Well, as I said before, at the time this was drawn up, we didn't know what the circumstances were in either case insofar as United was concerned. The same thing was true with regard to Western because we were in the midst of a representation dispute.

Q. When was Exhibit A drawn up, Mr. McKinney?

Mr. Crawford: I think I can answer that for him.

Mr. Renda: Last fall, I think.

Examiner Wrenn: I have a letter here signed by Mr. George M. Harrison addressed to me dated November 12, 1948. I had attached to it copies of the Brotherhood's exhibits. I don't know if they are the same ones that are being offered here today or not. Would it help you any, Mr. Crawford, if I show you this letter?

Mr. Crawford: I think I can clear that up. I think he wants to go back further than that. I will explain that. [2444]

Q. (By Mr. McErlean): You say you were in

(Testimony of Lyle McKinney.)

some dispute at the time Exhibit A was drawn up?

A. A representation dispute.

Q. That was prior to the consummation of this sale, wasn't it? You already testified you were certified on September 9, 1947?

A. That is right.

Q. Is that when Exhibit A was drawn up?

A. After that.

Q. You didn't have a representation dispute after you were certified, did you?

A. No, we had another kind of dispute after we were certified.

Q. What was the dispute which caused you to include in Exhibit A a request for conditions to be imposed against United?

A. We thought that there might be some employees as a result of this sale, Western employees, who would be absorbed by United. The thought at the time was, if there were, and they were not placed in the same position as other employees, they should be given the same protection.

Q. Can you explain it a little more?

A. If a Western employee owned his home in Denver and he was forced to move to San Francisco as a result of the sale and had to take a loss on his house, we would provide in the agreement that the loss would be made up to him by the carrier.

Q. What carrier? [2445]

A. Western Air Lines, if it is a Western Air Line employee. If you absorb an employee as a result of that, he would be given the same protection by United as a Western employee.

(Testimony of Lyle McKinney.)

Q. If we have hired any employees of Western since the date of consummation, do you say they have some sort of protection?

A. No, any of the employees you have hired since that time—this would not be applicable to them. Insofar as I know, you didn't take over any, so this wouldn't be applicable to you.

Q. Were you under the impression that United had agreed to take over as part of the assets some of the employees of Western?

A. I didn't know.

Q. Was your organization represented at the hearing before this Board in May of 1947?

A. I think they were.

Q. You heard the President of United Air Lines testify? A. No, I wasn't here.

Q. Did you ever examine the agreement of purchase? A. No.

Q. Did you know when Exhibit A was drafted for purposes of filing with this Board?

A. I would have to guess on when the final draft was ready.

Q. Wasn't Exhibit A drafted and prepared some time in the fall of 1948?

A. I think that is correct, yes.

Q. Approximately a year after United started to operate [2446] Route 68? A. That is right.

Q. Do you know of any employee in United Airlines who was adversely affected in your sense

(Testimony of Lyle McKinney.)

of those terms by United's acquisition of Route 68?

A. I do not.

Q. Are you claiming some formula should be placed in effect by the Board to affect United's employees? A. No. That is up to the Board.

Q. I am asking you whether you make that claim to the Board? A. No.

Q. Is your position asking this Board to put into effect some condition that will operate to the benefit or detriment whatever it may be of United's employees? A. No.

Mr. McErlean: I have no further questions.

Examiner Wrenn: Mr. Kennedy.

Cross-Examination

By Mr. Kennedy:

Q. Does the Brotherhood have a system-wide seniority list of the employees it represents?

A. Yes. The agent classification and Western classification and the store's employees are all system-wide seniority rosters.

Q. Do you have any other kind of seniority roster? Do you have one that is confined to a base?

A. General office employees located in Los Angeles.

Q. That is just Los Angeles seniority? [2447]

A. Yes.

Q. Could you tell me what classes of employees the Brotherhood represents?

A. The designation is clerical, office, stores, fleet and passenger service employees. That embraces

(Testimony of Lyle McKinney.)

ticket agents, reservation agents, cargo handlers who load and unload the freight—all types of clerical employees and commissary employees who handle the food.

Q. Do you know whether comparable employees of United Air Lines are organized in any union or Brotherhood?

A. To the best of my knowledge, they are not. A part of them may be organized, but to the best of my knowledge, no.

Q. Assuming that the application of the Burlington formula was limited to Western employees, do you have any thought as to whether Western should bear all of the liability under the formula or whether United should bear half or whether United should bear all? What would be the best solution?

A. I would leave that up to the Board. I have no opinion on that.

Q. You don't have any proposal on that?

A. No.

Mr. Kennedy: That is all, Mr. Examiner.

Examiner Wrenn: Are there any other cross-examination questions?

Mr. McErlean: I have some.

Further Cross-Examination

By Mr. McErlean:

Q. Don't you know United store's employees are represented [2448] and organized by a labor organization? A. I don't.

Q. If I asked you the same question about our

(Testimony of Lyle McKinney.)

cargo or ramp service employees, would your answer be the same?

A. The last information I had on it, I understood that they were under contract with District 50, United Mine Workers; whether they still are or not, I don't know.

Q. You are a little out of date.

A. I could be.

Q. Are you active in organizing this industry on the West Coast?

A. Not on United Air Lines.

Q. I said in the industry. A. Yes.

Q. And you have no information as to who may represent United's ramp service employees and janitors? A. No.

Mr. McErlean: That is all.

Redirect Examination

By Mr. Crawford:

Q. With reference to Mr. Cassidy, do your records show that he did lose some time after he was furloughed and the time after which he accepted a transfer or some employment with Western?

A. Yes, he lost salary in the 25th. He was offered employment on the 23rd. He resumed work on the 25th. He lost salary from the time he was furloughed until the time he resumed work.

Q. With reference to Mr. Renda's offer to you to pay [2449] those that had transferred, which he did, was that a separate transaction on each one, or was it with reference to a conference you were having in an attempt to work out some agreement?

(Testimony of Lyle McKinney.)

Were there any conditions attached to the offer, or was that just an out and out offer to take each one down and pay the transportation?

A. Mr. Renda indicated at the last conference—unfortunately we didn't get to see each other again because of the unavailability of first he and then myself—but at the last conference, Mr. Renda indicated it might be possible for us to go down the list name by name and determine who had suffered a loss of traveling expenses and salary loss and he said he was quite sure the company would be willing to pay the employees.

Q. That was the limit of his offer, that he would offer to pay the employees? A. Yes.

Q. There was one other question Mr. Renda asked you. I think it was with reference to that part of the Burlington formula on the payment of employees who have been displaced. He said in substance—naming two or three employees—the record showing the nature and extent of their adverse effect just shows transfer.

The displacement provision of the Burlington formula would not be necessary as to those employees. I think you explained that a little later, but I would like to ask you this: That would only be applicable to those particular employees. Isn't it a fact that those employees who would transfer from Denver to San Francisco, would possibly bump or displace some other employee and on down to the line to [2450] the end of the chain?

(Testimony of Lyle McKinney.)

A. That would be true among the cargo group of employees who were under contract.

Q. I just wanted to establish this: As to the employees who have suffered no displacement regardless of their loss of traveling expense and so forth, the displacement provision would not be necessary to them; but as to any employee who had been displaced by reason of their transfer, then the displacement provision would be applicable, would it? A. That is right.

Q. Getting back to Mr. Elliott, I think I didn't get all of the information on Mr. Elliott. Did he lose any time in between the time he wrote the carrier? I think you produced a copy of a letter at the request of Mr. Renda.

A. Well, after Mr. Elliott was furloughed, he never performed any service again for Western Airlines. He never heard from them regarding the exercise of his displacement right. He hired out with Monarch Airlines and went to work for them.

Q. The copy of the letter you showed to Mr. Renda had relation to that? A. Yes.

Q. Is the copy of the letter you have in your hand the one handed to Mr. Renda and the one which he read? A. That is correct.

Mr. Crawford: I offer it in evidence. It is only a copy.

Mr. Renda: I have no objection. [2451]

Q. (By Mr. Crawford): Please read that letter into the record, Mr. McKinney.

A. This letter is dated August 23, 1947. It is

(Testimony of Lyle McKinney.)

addressed to Mr. Eastman, Western Airlines.

"Dear Sir:

"Your letter August 20, 1947, in regard to my furlough effective September 2, 1947, received.

"Would like very much to exercise my seniority rights by asking for a transfer to another Western Airlines Company station.

"Thank you."

It is signed by Arthur R. Elliott, Denver Cargo.

Q. It is your understanding he never received any reply? A. That is all.

Recross-Examination

By Mr. Renda:

Q. In connection with the question which Mr. Crawford asked you on redirect, let us take the case where an employee of Western was transferred from Denver to San Francisco, and by exercising his seniority there pursuant to the contract, it may result in the furloughing of some employee further down on the list. Is that not the same situation as would happen in the event of a curtailment on the part of Western when there is no route transfer involved? A. Yes, sure.

Q. With respect to the moving expenses, do you recall having had a conference in December of thereabouts of 1948, I believe, with Mr. [2452] Kelly? A. That is right.

Q. That was a conference with respect to these matters at the suggestion of the Board?

(Testimony of Lyle McKinney.)

A. Not with respect to these matters. It was my understanding that what we were instructed to do was to attempt to meet and agree upon a formula similar to the Burlington formula. Mr. Kelly was not agreeable to negotiating any formula. His position was that if there were any employees adversely affected, name them, and let us talk about them.

Q. Isn't it a fact that at that conference Mr. Kelly asked you to submit to the company a statement setting forth what employees had not been reimbursed for moving expenses and transportation cost, and so forth, brought about by their transfer from one station to another, do you recall that?

A. I recall Mr. Kelly asking us to name the employees who were affected, but he wasn't willing to negotiate any formula.

Q. In any event no such claim has ever been submitted to Western either by these individual employees or by the Brotherhood on behalf of these employees?

A. I believe that there is one who has presented his claim, but he has had no settlement of it.

Q. Do you know that from your own knowledge?

A. From my own knowledge of what he told me.

Q. Who is that person? A. Mr. Ross.

Q. Mr. Ross? A. Yes.

Q. When did Mr. Ross submit his claim? [2453]

A. Prior to the time he was transferred from Denver to Los Angeles, a request was made to have the company assume his expenses. They were declined before he ever started the trip.

(Testimony of Lyle McKinney.)

Mr. Renda: That is all, Mr. Examiner.

Examiner Wrenn: Is there anything more, Mr. Crawford?

Mr. Crawford: That is all.

Mr. McErlean: I would like to ask another question in the light of what Mr. Crawford asked him.

Examiner Wrenn: Go ahead.

Cross-Examination

By Mr. McErlean:

Q. Did I understand you to say that this displacement provision would apply to somebody on down the line if somebody moved from Denver to San Francisco and a younger man were displaced? Did I understand your testimony properly?

A. It is possible that that man was adversely affected as a result of the sale of Route 68. If an employee in Denver is displaced and he exercises his seniority right——

Q. If a man went from Denver to San Francisco and no one was laid off at that time—but if a man was laid off tomorrow, would this formula apply?

A. I don't think so.

Mr. McErlean: That is all.

Examiner Wrenn: Thank you.

(Witness excused.)

Mr. Crawford: I renew the offer of my exhibits in evidence.

Examiner Wrenn: Is there any [2454] objection?

(No response.)

Examiner Wrenn: They will be received in evidence.

(The documents heretofore marked Exhibits BRC-A, B and Supplement B, for identification, were received in evidence.)

Mr. Crawford: This morning you made a statement before Mr. McKinney took the stand that there was no agreement between Western and the Brotherhood. It was obvious you were referring to this particular transaction and not to the fact that there is a collective bargaining between the parties. There is no such question that we know of.

Examiner Wrenn: That completes your case, Mr. Crawford?

Mr. Crawford: That completes my case.

Examiner Wrenn: Again, I will ask if anyone from the UAW-CIO is here.

Let the record show no appearance was noted the first day and there has been no response since from them.

Mr. Renda, will you proceed with your case?

Mr. Renda: I call Mr. Arthur F. Kelly.

Whereupon

ARTHUR F. KELLY

was called as a witness on behalf of Western Airlines, Inc., and having been first duly sworn, was examined, and testified as follows:

Mr. Renda: At this time, Mr. Examiner, I pre-

(Testimony of Arthur F. Kelly.)

sent herewith two copies of exhibits which I would like to have identified as W-1 through W-18 and WR-1 through WR-7.

Examiner Wrenn: Those are the exhibits which have been previously distributed to the parties?

Mr. Renda: With the exception of WR-7 which I am now [2455] handing to counsel. These are certain percentages I have reduced to figures overnight rather than having Mr. Kelly testify in detail.

Examiner Wrenn: Those documents which you have just referred to will be marked for identification, as requested.

(The documents referred to were marked W-1 through W-18, inclusive, and WR-1 through WR-7, inclusive, for identification.)

Direct Examination

By Mr. Renda:

Q. Please state your name for the record.

A. Arthur F. Kelly.

Q. What is your position?

A. Vice President, Traffic.

Q. How long have you been Vice President of Traffic? A. Just recently.

Q. Prior to that what was your position?

A. Executive Assistance to President of Western Airlines, Mr. T. C. Drinkwater.

Q. All told, how long have you been in the employ of Western Airlines? A. 13 years.

Q. In your capacity as Assistant to the President of Western Airlines, did you have occasion to

(Testimony of Arthur F. Kelly.)

study, review, consider and deal with the issues in this particular case? A. I have.

Q. Were Exhibits W-1 through 18 and WR-1 through 7 prepared at your direction and under your supervision?

A. At the request of Public Counsel under my direction [2456] and supervision.

Q. And with the exception of Exhibits W-12, 13, and 14 which are reproductions of certain labor contracts, you sponsor these exhibits?

A. Yes.

Q. Will you please state Western Airline's position in this case.

A. It is Western Airline's contention that no employees of Western Airlines were or have been adversely affected as a consequence of the transfer of Route 68 and certain physical properties to United Airlines.

It is further the contention of Western Airlines that such alleged consequences do not lead to any necessity for the application of the Burlington formula or any so-called formula to take care of any employees allegedly adversely affected by this transaction.

The attachment of such conditions to the Board's original decision on Route 68 is not necessary because to the best knowledge of Western Airlines no such problem exists for the application of such a formula.

I think to present Western Airlines picture in its prospective we have to go back to the end of

(Testimony of Arthur F. Kelly.)

about 1946 and the beginning of 1947 when Mr. Drinkwater took over the active management of Western Airlines. I refer you to Exhibit No. W-5, page 1——

Q. WR-5.

A. ——as a guide to follow in the general problems of Western Airlines.

At the end of 1946, Western Airlines found itself in [2457] the same relative category as many of the other airlines. They were over-staffed. Their equipment program had not been consolidated or solidified. An economy program was necessitated by virtue of the various economic circumstances facing the industry at that time.

Western entered into a broad economy program at the end of 1946 and the beginning of 1947 to the extent that in the latter part of 1946, Western Airlines had approximately 2486 people. By December, 1948, the figure had been reduced to 1290 people.

This program has been difficult. Consolidations and personnel cut-backs have always been far more controversial, hazardous than expansion and luxurious specialization. The issues involved in these cases are examples of some of the difficulties that economic operations will present and have presented to airline management.

To break this down, we can put this into two classifications. The first classification is the pilot classification. Western Airlines' position with regard to the pilot problem is that, and it has restated

(Testimony of Arthur F. Kelly.)

its position time and time again, if this problem of transferring Western pilots to United Airlines can be worked out with ALPA and United Airlines, Western interposes no objections provided we receive sufficient time to train pilots who must necessarily be used as replacements for pilots that might be transferred to United.

It should be clearly understood by the Board that Western is not denying or affirming the right of the Board to direct the transfer of these pilots, nor are we admitting [2458] that any pilots were adversely affected by reason of the sale of Route 68. It is the honest opinion of Western Airlines, based on factual data, that the Board would be treading on dangerous ground to allow ALPA to take advantage of normal seasonal cut-backs, to set up a far-reaching precedent which might possibly affect the very economy of airline operation.

It is well known that unfortunately year after year——

Mr. Bennett: Just a minute, if I may. I think we passed from a category of testimony and facts into argument. I don't think this is a proper place for that. I would suggest that he testify as to facts that he knows. I think that is the proper prerogative of a witness.

Examiner Wrenn: I want him to testify to the facts. Go ahead, Mr. Kelly.

Q. (By Mr. Renda): Continue please, Mr. Kelly.

A. It is well known that unfortunately sea-

(Testimony of Arthur F. Kelly.)

sonal cutbacks must be effected in order to maintain stable economy within the airlines. The pilots that were furloughed by Western Airlines on September 15th were not furloughed as a result of the sale of Route 68, but by many factors basically founded on low load factors and the seasonal decline in business.

That would not allow Western Airlines in interest of economic and efficient management to continue a peak operation in the fall of 1947. These conditions also existed in 1946 and 1948.

We feel that the airlines are a young and mobile business [2459] and that unfortunately they have not yet settled to the point where they can guarantee domicile, places and types of training and other matters effecting economic transfers, consolidations and efficient utilization of equipment.

Turning to the other problem in this case, ground personnel, Western can only state that such reductions in force followed pretty well the pattern of the general industry personnel reductions. It can be further added that the cutback started when Mr. Drinkwater came with Western Airlines beginning January 1, 1947, and it is continuing.

As an example, at the same time we were reducing personnel in Denver, at the time of this sale, many more personnel in the same classification were being reduced for instance in Salt Lake City which had nothing to do with the sale of Route 68.

There is an example of this in the mechanical personnel. The average reduction in Denver was

(Testimony of Arthur F. Kelly.)

35 per cent, as I recall. Our average reduction in Salt Lake was 68 per cent. It was a system reduction, pure and simple.

As far as the application of the Burlington formula is concerned, as it applies to ground personnel, we have a few notes to make on that. We have not analyzed it in complete detail. At the request of the Board we had informal discussions. It is basically impossible for an organization to analyze a formula unless they know the scope of their financial responsibilities in such a thing.

At no time were we able to get together with parties involved to determine exactly what our basic financial responsibilities would have been. As a result, we did not [2460] analyze it thoroughly. It has been the contention, as I mentioned before, of Western that no one was adversely affected by the sale of this route. Such a formula was not applicable to this particular problem.

In passing, I might say that just briefly reviewing the Burlington formula, we have in our standard operating procedures, which affect all types and classes of employees in Western Airlines, several items incorporated from the Burlington formula. These are examples of it. I will read that section that has some application to some of the points of the Burlington formula. I would like to read it in the record.

Mr. Bennett: Examples of what?

The Witness: Standard operating procedures.

(Testimony of Arthur F. Kelly.)

"Oral requests will not be considered as the basis for granting a transfer.

"Rates: A. Movement of household goods. (1) When an employee is transferred at the company's request he shall be allowed actual reasonable moving expenses for household effects up to a maximum of eight hundred (800) cubic feet or 5200 pounds, if substantiated by properly receipted bills for shipping, insurance, drayage, packing and unpacking, indicating the number of cubic feet or its equivalent of household effects being handled. The company may at its option prescribe or control the shipment from the time of packing at the point of departure to the time of unpacking at the time of arrival.

"B. Travel and subsistence allowance. (1) Transportation. (a) By personal car: When an employee is transferred [2461] from one station to another at the company's request and his car is driven from his former domicile to the new station he shall be allowed actual cost of gasoline and oil if substantiated by receipts therefor, or at the employees option, the rate of five cents (5) per mile by the shortest highway mileage between such points. (b) Other means. If the employee being transferred does not drive his personally owned automobile, he will be supplied free pass transportation to the new station, or will be reimbursed actual expenses for rail, bus or air transportation as authorized by travel orders. (2) Subsistence allowance: In addition to moving and transporta-

(Testimony of Arthur F. Kelly.)

tion allowances, an employee transferred at the company's request to a new station shall be allowed his actual hotel expense if substantiated by receipts, and in addition shall be allowed a per diem allowance of four dollars ($4.00) per day while enroute. The provisions of SPI 2-1, paragraph b (2) shall govern the computation of the per diem allowance to which the employee shall be entitled. (3) Any employee who transfers from one station to another pursuant to the exercising of seniority rights under any union agreement, and who is not requested by the company to make such transfer, or any employees transferring at their own request shall pay all costs incurred by him as a result of such transfer, such as transportation (except for furnishing of subject-to-space transportation when such move can be successfully made by plane), movement of household goods, and travel expenses."

Q. (By Mr. Randa): Is that standard company policy which applies to [2462] all employees whether under contract with some labor organization or not? A. That is correct.

I might add that we follow this procedure as carefully as we can. However, if there are some cases, as we have restated to the Brotherhood as well as individual employees, by virtue of some of the supervisors overlooking the responsibilities of Western Airlines, we restate if proper claim and proper record is made, we will enforce it and it will be considered with its proper merits under company policy.

(Testimony of Arthur F. Kelly.)

Q. Do you have any further remarks to make with respect to the Burlington formula?

A. Yes, just general comments.

I would like to add that this is a young and mobile business. We don't feel at the present time we can be saddled by what we might call additional unemployment insurance. Any further responsibilities taken over by the airlines corporately or by virtue of air mail pay does not seem consistent with the mobility and necessity to effect certain constructive moves within this industry. We feel it will have a tendency to discourage consolidations, mergers and other constructive moves set up by the Board as part of their general policy.

I think a very good example of some of the difficulties involved in this is: Where does it stop? Where does it start? As an example, is it going to affect station consolidations? Is the Burlington formula going to be applied to schedule cut-backs? In this particular case that we are speaking of, we don't feel it has any application. We feel it is going to set up a bad precedent and it is going to be [2463] a serious mistake on the part of the airlines to accept this formula.

We feel it is filled with railroad philosophy. There are good things and bad things in the railroad business. Generally speaking, if a formula of this type is necessary, the airline should build one in proportion to the dynamic character of the industry itself.

I would like to add one more thing: We agree

(Testimony of Arthur F. Kelly.)

that certain thought should be given to this problem, but we think those efforts on the part of the Board and industry should be directed to something like this: If as a result of circumstances, either transfers, schedule cut-backs or other items pertaining to the industry, personnel are involuntarily cut back, especially the skilled personnel, personnel like mechanics and pilots, we feel there is a definite responsibility on the part of our Government to recognize that as a waste as far as the national defense is concerned.

Western Airlines at the present time is setting up a military air transport reserve unit within the confines of our maintenance and administrative buildings in Los Angeles and we hope that one of the objectives of that will be to absorb pilots on a seasonal basis when they are furloughed temporarily from the airlines.

We have looked with a great deal of concern over the tremendous waste of specialized personnel caused by seasonal cut-backs. We feel that that is a partial answer to keeping this reservoir of skilled personnel constructively utilized at the periods when economics within an airline company as an example make it impractical to continue their employment, [2464] especially the junior men throughout the season as a whole.

Q. Mr. Kelly, in the event the Board should find in this case that certain employees have been adversely affected, and condition No. 2, that they should be taken care of by the application of either

(Testimony of Arthur F. Kelly.)

the Burlington formula or something similar to it which would result in Western having to pay a substantial number of claims in money damages, what would be Western's position?

A. There is no question in my mind that if Western Airlines is faced with a substantial payment, retroactive, they would defer any payment until they could present their mail case so they could present it as a legitimate expenditure, providing management is honest, efficient and economical.

Q. Will you refer to WR-2. Will you please explain why in this daily flying time study you have used the dates July 6, August 6 and September 19, 1947?

A. July 6 was used in this study because at some of the informal conferences we had, it was at that time ALPA's position this was a normal operating month. I might qualify by stating we don't agree on that. We have used it for the sake of comparison.

Q. I invite your attention to the concluding figures of 141 hours and 50 minutes, total flying time as of July 6, 1947, and 111 hours and 55 minutes as of September 19, 1947, resulting in a decrease during that period of time of 29 hours and 55 minutes. Will you please explain the causes which brought about that decrease?

A. I might preface that by stating that the August 6 filing date in this analysis was the filing date of the [2465] beginning of the August schedule. The September 19th date was the filing date of our

(Testimony of Arthur F. Kelly.)

complete schedule cut-back in addition to the termination of Route 68.

Q. Will you please explain in detail the schedule cutbacks which resulted on September 19th and the flying hours involved in each segment? First let us take Los Angeles-Salt Lake City.

A. First, let me say this is a practical approach to a daily flying time study. It would definitely have an effect on pilots and utilization of equipment. It is noted that from July 6 to September 19, that is what ALPA considers a normal operating month of the entire period, over to September 19, which was the date of our complete schedule cutbacks, September 19, there was 6 hours and 30 minutes taken off the Los Angeles-Salt Lake run.

Q. What happened with respect to the Salt Lake-West Yellowstone run?

A. 4 hours 30 minutes was taken off.

Q. What happened to Los Angeles-San Francisco? A. 8 hours were taken off that run.

Q. How about the Great Falls-Butte segment?

A. 1 hour and 30 minutes.

Q. For a total decrease in flying hours brought about by schedule cut-backs of how many hours?

A. These schedule cut-backs attributed to pure and simple seasonal cut-backs which amounted to 20 hours and 30 minutes.

Q. Have you any reasons to account for the 9 hours and 55 minutes which is the difference between the 20 hours and 30 minutes you just testified

(Testimony of Arthur F. Kelly.)

to and the 29 hours and 55 [2466] minutes indicated on this exhibit?

A. The 9 hours and 55 minutes—there was 2 hours and 50 minutes taken off—looking at the system as a whole—there was 2 hours and 50 minutes taken off of the Rapid City-Sheridan cut-off, as I recall it.

Two hours and 50 minutes was taken off the Billings-Great Falls segment. The system was 5 hours and 50 minutes additional. That leaves a net of 4 hours and 15 minutes.

Q. Will you please turn to Exhibit WR-4. Will you please tell us what that exhibit purports to show?

A. I think as you look at the general trends that it purports to show through 1946 the build-up in the spring and the cut-back in the winter and in 1947, the build-up in the spring and the cut-back in the winter and in 1948, the build-up in the spring and the cut-back in the winter. That is about the only thing I can say that graphically depicts as far as our operation is concerned.

Q. Please turn to WR-5 and tell us what this shows.

A. This curve reflects the history of employment. I think it reflects it started in June of 1947. I think the personnal cut-backs were fairly consistent with the load factors up to August and September—73 per cent. October, 56 per cent load factors. November, 49 per cent load factors. December, 54 per cent load factor.

(Testimony of Arthur F. Kelly.)

It has a certain effect on indicating the wisdon of schedule cut-backs as far as business is concerned and in turn, as they reflect utilization in personnel.

Q. Is it your opinion that there is a direct relation between load factors, seasons and the number of personnel [2467] required?

A. There is no question about it.

Q. Would you please turn to WR-6 and tell us what that exhibit purports to show.

A. This exhibit purports to show through the month of December the progress that was made throughout the year 1937 to '38. It reflects the ton-miles flown on Western and Inland and the available ton-miles flown per employee. Anytime you can get those curves flown that close together, it reflects a reasonable and efficient management. In 1946 the available ton-miles and the production line being so far spaced, it indicated a certain over-staffing and a certain lack of production. The closer you get them together, the more efficient your company can be according to the individual unit in proportion to the load you are carrying.

Q. Would you please refer to Exhibit W-6 in the bound volume?

A. This exhibit is supplied at the request of Public Counsel. It is a comparison of pilot hours flown on Route 68 as of July and August 1947 and pilot hours flown between San Francisco, Seattle and Portland during July 1948. I would just like to point out one thing on this as far as the normal operation of these various route segments are con-

(Testimony of Arthur F. Kelly.)

cerned. At this time, I was chairman of the Schedule Committee to schedule these aircraft. At the time that we started operation from San Francisco to Seattle, it was done in stages. The first stage was August 1st. The second stage was in September. There is no question in my mind that had we continued to have flown Route 68, the only schedules that that route could have sustained, would have been two schedules. [2468]

Q. What forms the basis for that opinion?

A. In scheduling aircraft, one must necessarily forecast and look ahead as to the effect of changing conditions on scheduling.

Let me go back one step further. There was a time we flew six schedules on the LA-Denver operation. Many people were extremely encouraged about the potential of that segment, but it must be borne in mind, and I say this without retrying or reopening the Route 68 case, one of the primary reasons why that route was considered for sale was that in effect it is definitely a part of a transcontinential route structure.

In 1946, when Western Airlines was able to fly six schedules, it must be borne in mind Western Airlines was the only major line connecting with United at Denver that had four-engine equipment. We first inaugurated the post-war DC-4. It was an attractive service to the public in Los Angeles, Chicago and New York even though it was a connecting service in Denver.

Changing conditions brought about by the advent

(Testimony of Arthur F. Kelly.)

of American, TWA and United which brings us to the point of 1947, when about 40 per cent of our business was the business of Denver. Throughout that summer, even though load factors were high, we could see the coming effect on Western's ability to compete in that market based on the equipment TWA and American were bringing into effect in the spring of 1947.

On May 19, 1947, it was announced that United Airlines, and TWA would be allowed route consolidations allowing them to fly [2469] non-stop New York-Chicago-Los Angeles.

That was bound to affect between 37 and 40 per cent of our business. United was going to sell transcontinental business on their non-stop. They didn't put that into effect in July, 1947. They were getting geared up to press hard their non-stop advantages out of the LA market. In our company relationships, we were beginning to see the effect that was going to have on us.

Formerly we were all enthused. United was gradually working on its non-stop operation. Borne out by the load factors from September 15 to October 15, even though our load factor on our two schedules beginning August 1 were high, the load factors started gradually diminishing. In my responsibility, in scheduling that aircraft, had we continued to fly it, we would not have flown it with more than two schedules.

Q. You are familiar that in the summer months

(Testimony of Arthur F. Kelly.)

of 1948 you only operated two passengers schedules over Route 68?

A. It is quite obvious. It must be borne in mind where our break-even load factor at the present time is 45 per cent, as I recall, the break-even load factor in Western was about 65 per cent and the break-even load factor on United was 65 and 70 per cent.

Examiner Wrenn: You didn't pay much attention to an LA-Twin City operation in there, did you?

The Witness: Yes, we had connections from LA to Twin Cities on that, Mr. Examiner.

Examiner Wrenn: You are testifying here that you would have had two schedules without regard to that?

The Witness: Yes, sir, I testified we would have two [2470] schedules. In the peak period of 1948 when United was flying two schedules, we worked out direct connections between LA and the Twin Cities through the Denver gateway.

Q. (By Mr. Renda): In connection with the question the Examiner just asked you, Mr. Kelly, isn't it a fact since Western has been operating a non-stop DC-3 service between Denver and Minneapolis, that that service other than during peak summer months has been only able to support one DC-3 schedule?

A. Yes. I don't think there is any question about the potential and the traffic and the market that is there. I think the Examiner is correct in his observation on that.

(Testimony of Arthur F. Kelly.)

Q. Will you refer, again, to Exhibit W-6?

Please tell us if in your opinion August and September should be considered the normal operating period on which a comparison should be made with the number of additional hours flown north of San Francisco to Seattle rather than February and July, as indicated by the ALPA?

A. I don't think you can generally classify a normal operating month, but certainly August and July cannot be considered a normal operating period.

Q. In any event, in your opinion, if Western had continued to fly Route 68 subsequent to September 15, 1947, it would not have been able to have supported more than two DC-4 schedules?

A. I do not think so.

Q. Will you please turn to Exhibit W-8?

A. This is the letter written by Chief Pilot Thayer to all pilots dated September 4th wherein he identifies by name [2471] 23 pilots who were to be furloughed effective September 19th.

Q. Do you know how many of the 23 were hired for the first time by Western subsequent to the commencement of the hearing in this proceeding on May 20, 1947?

A. Seven of these men where hired after the hearing on Route 68.

Q. Which 7?

A. Kettler, Critchel, Taylor, Edgerton, Meford, Hippe and Keys.

Q. You will note that Beach and Peterson

(Testimony of Arthur F. Kelly.)

elected to go on furlough rather than transfer to Denver. A. That is correct.

Q. Of the remainder, other than the 7 you just named, and Beach and Peterson, how many of those were recalled to flying status in the spring of 1947? A. 13 in this group were recalled——

Q. I mean the spring of 1948. A. 1948.

Q. In other words, the remainder of those names set forth in that letter. A. That is correct.

Examiner Wrenn: Let us take a five-minute recess.

(Short recess.)

Examiner Wrenn: Let us continue.

Mr. Kennedy: May I raise this point on the record?

Examiner Wrenn: All right.

Mr. Kennedy: As I have informally advised counsel for Western, if it appears on the basis of a canvass of counsel that we can finish with Mr. Kelly, I am willing to stay until five [2472] or such later time as the Examiner thinks is reasonable; but if it appears that there is going to be such extensive cross-examination that we can't finish tonight, I could be drafting a brief that is due on Friday, if we can adjourn early, it would help if I could get away. I would take second place on that to Mr. Kelly who I realize has to get back to LA. If we can't finish with him, I would like to adjourn early.

Mr. Renda: We would like to try to finish tonight if we possibly can, within reason.

(Testimony of Arthur F. Kelly.)

Mr. Kennedy: As far as I am concerned, I don't believe I would have more than five minutes with Mr. Kelly.

Mr. Bennett: It is contemplated our examination will be extensive and as a consequence, I would prefer to adjourn early, if that is agreeable.

Examiner Wrenn: All right.

Mr. Renda: It is not going to exactly agreeable with me, but I am willing to comply with the Examiner's feeling.

Examiner Wrenn: I think Mr. Bennett is entitled to whatever time he feels is necessary to examine the witness. I don't feel I am in a position to rush him any on that. I don't feel we ought to stay here until seven or eight.

Mr. Bennett: It might be well to defer to Public Counsel if he has something he has to get out of the way.

Mr. Kennedy: I don't want to suggest this if it will inconvenience anybody. If we can finish him, I will be glad to stay. If we can't, I would like to adjourn early.

Mr. Bennett: I don't like to stay late.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): Would you turn to W-18, which consists of pages 1 through 12? You will notice those are a series of letters written by Mr. Frank Eastman, Station Manager, to various employees. They are in the bound volume.

A. They are not in my copy.

Mr. Renda: Off the record.

(Discussion off the record.)

(Testimony of Arthur F. Kelly.)

Mr. Renda: Mr. Examiner, let the record show that I will furnish copies of that exhibit to Mr. Bennett or anyone else who doesn't have copies of them. But as I recall, that data was submitted subsequent to the time that the entire bound volume was mailed out.

Mr. Bennett: Our bound volume has missing Exhibits 17 and 18. It only goes through 16. There are no letters attached.

Mr. Renda: I am fairly certain that the material which is identified as Exhibit 17, page No. 1 and page No. 2, and Exhibit No. W-18, pages 1 through 12, were mailed out to the parties some time subsequent to the submission of the entire bound volume, which was in December or thereabouts of 1948. Do you happen to have that material, Mr. Kennedy?

Mr. Kennedy: It is in my bound volume and I think it is because it was put in. It was distributed after the bound volume. We received copies.

Mr. Renda: We will be more than glad to submit additional copies to those who do not have them. I am fairly certain we sent them out.

Examiner Wrenn: Are these they?

Mr. Renda: Yes.

May I proceed? [2474]

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): Do you have any comments to make with respect to those twelve letters?

A. These are all ground personnel at Denver. It is a letter from the Station Manager, Mr. Frank Eastman. I would just like to comment briefly on

(Testimony of Arthur F. Kelly.)

the first paragraph, "Due to the disposal of Route 68, it will not be necessary we maintain the Denver station," et cetera, et cetera, and so forth. At the end it says, "Please advise if you desire to exercise your seniority rights at another company station."

We acknowledge the fact that people were affected by the sale of Route 68. The question at issue is whether these people were adversely affected. In transposing people from other route sections they would be affected. How they were adversely affected, is a question. In the case of ground personnel, we did everything we could to see that they were able to exercise their seniority rights.

Q. Now will you please turn to the Brotherhood's BRC Exhibit B and Supplemental B? I refer to the Brotherhood's exhibits.

Off the record.

(Discussion off the record.)

Mr. Renda: Let us hold in abeyance Brotherhood Exhibit B and Supplemental B. Mr. Kelly, and I will invite your attention, instead, to UAW Exhibit 1. In this connection, Mr. Examiner, I would like to make a brief statement.

Examiner Wrenn: Go ahead. [2475]

Mr. Renda: I presume since UAW has not made an appearance in this case, and since they have the burden of proof and the burden of going forward with respect to their case, there is actually no responsibility on our part to meet their case as they

(Testimony of Arthur F. Kelly.)

represented it at the pre-hearing conference.

Examiner Wrenn: There are no exhibits in the record.

Mr. Renda: That is right, so we are going to forego any detail analysis, and will only ask one question.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): I direct your attention to WR-7. Please tell us what that exhibit purports to show.

A. Exhibit No. WR-7 is an indication of the cut-back in general personnel classification under the maintenance classifications. I invite your attention to the first column, mechanics, as an example, with the total of all employees on December, 1946, Western Airlines had 242 mechanics.

In the fourth quarter of 1948, it was down to 178 mechanics, irregardless of the fact that we had more airlines at that time to maintain.

Since that time, Western Airlines has taken over the complete responsibility for their engine overhaul. They no longer contract Pacific Airmotive. They have taken over the additional responsibility which would normally call for the employment of more employees. It is a constructive trend. It shows we are doing as much work with our mechanical division with almost a third of the personnel we had at previous times. [2476]

Examiner Wrenn: Mr. Renda, I didn't mean that there should be any limitation to what you want to say. The Board's order made the UAW a

(Testimony of Arthur F. Kelly.)

party. My only reference is to any documents they sent around to counsel. They are not marked for identification and they are not a part of the record.

You proceed with any material you have which relates to their interest.

Mr. Renda: We are going to limit it to one exhibit which is addressed to their particular phase of the case.

Q. (By Mr. Renda): Now, Mr. Kelly, will you please again return to the Brotherhood exhibit that I brought to your attention a short while ago, but which I did not question you on.

Mr. Renda: Mr. Examiner, I have here four letters, one written by Mr. Harold Toomer to Frank Eastman, dated September 24, 1947; one written by Mr. Kenneth D. Cassidy to Frank Eastman, dated September 23, 1947; and one written by Mr. Howard E. Moore to Frank Eastman, dated September 23rd; and one written by Ed C. McAndrews, Jr., to Western Airlines, attention Mr. Eastman, dated September 23rd.

I ask that these letters be marked Western Exhibits WX-2, 3, 4 and 5.

Examiner Wrenn: They will be so identified.

(Whereupon the documents referred to were marked for identification as Exhibits WX-2, 3, 4 and 5.)

Mr. Renda: If you recall on the cross-examination of Mr. McKinney, I raised several points about which there seemed to be differences of an opinion.

(Testimony of Arthur F. Kelly.)

I stated as part [2477] of my direct case I would introduce certain evidence. That is the purpose of this.

Examiner Wrenn: Yes.

Q. (By Mr. Renda): Mr. Kelly, I will ask you to examine WX-2 and tell us whether or not that is a true and correct copy of this letter which is from Harold Toomer to Frank Eastman, dated September 24th? A. Yes, it is.

Q. I will ask you to examine WX-3 and ask you to tell us whether that is a true and correct copy of a letter written by Mr. Cassidy to Frank Eastman, dated September 23rd? A. Yes, it is.

Q. Please examine WX-4 and I will ask you if that is a true and correct copy of a letter written by Mr. Frank Moore to Mr. Eastman, dated September 23rd? A. Yes, it is.

Q. Please examine WX-5 and I will ask you if that is a true and correct copy written by Mr. McAndrews, dated September 23rd?

A. Yes, it is.

Q. Now, Mr. Kelly, will you turn to ALPA Exhibit No. 1? A. Yes, sir.

Q. You will note that on pages 2, 3, 4, 5, 6 and 7 of that exhibit are set forth the names of certain pilots that the ALPA says were adversely affected and on which there has been considerable testimony in this case. Will you please state whether I have asked you to make an [2478] examination of the earnings during 1946, 1947 and 1948 of the different pilots set forth in Exhibit ALPA 1?

(Testimony of Arthur F. Kelly.)

A. Yes, you have.

Q. Do you have that information with you?

A. Yes, I do.

Q. Will you please refer to Mr. L. E. Warden. Tell us what his earnings were in 1946.

A. $3,591.46.

Q. 1947? A. $4,165.74.

Q. 1948?

Mr. Bennett: Just a moment, please.

Examiner Wrenn: You will have to go more slowly. Counsel are trying to write the figures down.

Mr. Renda: To assist, I will distribute copies, but I want them read in the record.

Q. (By Mr. Renda): What was it in 1948?

A. $5,087.96.

Q. Turn to E. W. Chapman. What were his earnings in 1946? A. $7,596.77.

Q. 1947? A. $6,233.93.

Q. 1948? A. $6,645.41.

Q. Is there any special reason why his earnings in 1946 exceeded his earnings in 1947 and 1948?

A. Yes, in 1946 he was flying as a reserve captain. [2479] He was engaged in a pilot training program.

Q. When flying his pilot training program, is he assured of a bonus? A. Yes.

Q. Turn to Mr. Walter Hail. What were his earnings in 1946? A. $6,568.46.

Mr. Bennett: From where you are getting these figures?

(Testimony of Arthur F. Kelly.)

Examiner Wrenn: Give him the source of the figures.

The Witness: My notes. We took them down from our payroll records.

Mr. Bennett: You now have them on notes before you?

The Witness: That is correct.

Mr. Renda: Would you like to examine the notes?

Examiner Wrenn: No.

Mr. Bennett: I am interested in the source. The figures from which you are reading are made from notes that you made from the payroll records?

The Witness: That is correct.

Examiner Wrenn: Go ahead.

Q. (By Mr. Renda): 1946 for Mr. Hail?

A. $6,568.46.

Q. 1947? A. $7,043.98.

Q. 1948? A. $7,047.08.

Q. Turn to Mr. Frank Cole. What were his earnings in 1946? [2480] A. $6,143.05.

Q. 1947? A. $6,373.45.

Q. 1948? A. $6,759.70.

Q. Turn to Mr. Walter Peters. What were his earnings in 1946? A. $4,367.21.

Q. 1947? A. $5,409.61.

Q. 1948? A. $4,556.75.

Q. Was there any reason why his earnings in 1948 were less than they were in '46 and '47?

A. He had a two and a half month personal leave of absence.

(Testimony of Arthur F. Kelly.)

Q. Barchard. A. $8,608.44.

Q. 1947? A. $8,960.31.

Q. 1948? A. $9,928.48.

Q. Let us turn to Mr. Holt. 1946?

A. $7,707.63.

Q. 1947? A. $8,326.29.

Q. 1948? A. $8,082.27.

Q. Let us turn to Mr. Shesby on page 4; what were [2481] his earnings? A. $9,760.76.

Q. 1947? A. $11,096.20.

Q. 1948? A. $10,903.30.

Q. Let us turn to Mr. Keller; what were his earnings in 1946? A. $10,009.94.

Q. 1947? A. $10,412.68.

Q. 1948? A. $10,497.25.

Q. Let us turn to Mr. Young. What were his earnings in 1946? A. $9,030.90.

Q. 1947? A. $9,048.53.

Q. 1948? A. $9,785.33.

Q. Turn to page 5, Mr. Claude Gray. What were his earnings in 1946? A. $3,641.30.

Q. 1947? A. $4,193.94.

Q. 1948? A. $5,011.13.

Q. Let us turn to Mr. Conover.

A. $9,928.95. [2482]

Q. 1947? A. $10,232.40.

Q. 1948? A. $10,685.70.

Q. Let us turn to Mr. Bailey.

A. $8,697.74.

Q. 1947? A. $8,9*u*6.61.

Q. 1948? A. $9,411.58.

(Testimony of Arthur F. Kelly.)

Q. Was Mr. Bailey off in 1948 at any time?

A. No, my records don't show that he was.

Q. Let us turn to Mr. Keeley. What were his earnings for 1946? A. $9,753.01.

Q. And in 1947? A. $10,160.48.

Q. And '48? A. $10,330.51.

Q. Now how about Mr. Schuster; what were his earnings in 1946? A. $9,580.93.

Q. 1947? A. $8,809.43.

Q. 1948? A. $10,272.51.

Q. Was Mr. Schuster off in 1947?

A. Yes, Mr. Schuster had a three-week personnel leave of absence starting October 6, 1947. [2483]

Q. Turn to Mr. Ryan. What were his earnings in 1946? A. $10,376.90.

Q. 1947? A. $11,871.29.

Q. 1948? A. $11,519.93.

Q. Turn to page 7. A. Yes.

Q. Mr. Fred Wahl; what were his earnings in 1946? A. $9,954.80.

Q. 1947? A. $11,862.88.

Q. 1948? A. $11,256.68.

Q. And the last one, Mr. Floyd Aker; what were his earnings in 1946? A. $10,342.27.

Q. 1947? A. $12,596.62.

Q. 1948? A. $12,076.63.

Mr. Renda: Mr. Examiner, that concludes Western's case.

Examiner Wrenn: Mr. Bennett, you may begin your examination of the witness.

Mr. Bennett: It is 4:30. I was under the im-

(Testimony of Arthur F. Kelly.)

pression we were going to adjourn early. I would prefer to defer any examination until the morning, if I may.

Examiner Wrenn: What time did you want to adjourn?

Mr. Kennedy: If we could adjourn now, it would be a [2484] help. I am willing to stay.

Examiner Wrenn: Off the record.

(Discussion off the record.)

Examiner Wrenn: Mr. Crawford, you may proceed.

In the off-the-record discussion we discussed the problem of cross-examination and we are switching the order. The Brotherhood is going to go ahead and Public Counsel.

Cross-Examination

By Mr. Crawford:

Q. Referring to the four letters introduced into evidence by Mr. Renda, written by the employees Moore, Cassidy, and so forth, have you those before you? A. Yes, I have.

Q. Take the one from Mr. Toomer to Mr. Eastman. A. Yes.

Q. Referring to your Exhibit 18, page 4, which is a copy of the letter written by—— A. 18?

Q. Yes.

That is a letter written by Frank Eastman, your Station Manager, to Mr. Toomer, dated September 9th. I am not going to read the letter. It was with reference to the subject of Route 68, and he would be furloughed effective midnight September 14th.

(Testimony of Arthur F. Kelly.)

I checked your Exhibit 3, pages 13 to 23, which shows that he was furloughed on that date, September 14, 1947. The fact is that this letter is dated September 24th, where he declined to go to Casper, but there is a lapse of time, although that is one you show 14, we only claim 18, but in either event there was a space of time between the [2485] date he was actually furloughed until he was offered a move and declined it. A. That is correct.

Q. Was he paid for any time lost between?

A. I don't think he was, and I don't think any claim was made for it, Mr. Crawford.

Q. Would that apply to all of them, to shorten time, Mr. Cassidy, Mr. McAndrews and Mr. Moore? I have checked those letters. Eastman notified them they would be furloughed as of September 14th. I have checked your Exhibit 3 and the pages.

A. I am familiar with the individual.

Q. It shows that they were furloughed on the dates on which you notified they would be. Under the same proposition of the dates of their letter, there would be a space of time between the time they were furloughed until they did decline to take employment.

A. That is correct. In the case of Mr. Toomer, in the time that elapsed, he was considering whether he wanted to go to Casper.

Q. There was a space of time in which he lost time by reason of the furlough up until the time he was offered a position. None of these employees coming under that category have been paid for that

(Testimony of Arthur F. Kelly.)

time off? A. That is correct.

Mr. Renda: So that record may be straight. There is no dispute as to that. These letters were offered to show that there had been an offer of position perhaps elsewhere on such and such a date. The employee may have waited a while before he accepted it. [2486]

Mr. Crawford: I thought it would be best to show that space of time.

Examiner Wrenn: Yes.

Q. (By Mr. Crawford): I understood you to say that you didn't think the Burlington formula was applicable to the airline industry and it was your suggestion that some suggested formula, particularly for the airlines, should be made. Didn't the Board give you an opportunity to make a suggestion as to the formula you might think would be applicable to the airline industry in this particular case? A. Yes, they did.

Q. I am referring to the time we had two conferences in L. A., of which Mr. McKinney spoke. I understand you declined to consider suggesting any formula, but insisted that we sit down and go over employees one by one; is that correct?

A. Before I want to discuss a solution or formula, I want to know the extent of my liability. I think that is a good business practice. Before you establish a formula, you have to know what your liability is going to be.

Q. Have you subsequently offered any suggested formula which you think might be applicable?

A. No, it wasn't until this case presented it. It

(Testimony of Arthur F. Kelly.)

was only a case of people who were allegedly affected.

Q. The only formula you have is the policy you read into the record?

A. That is an example of some of the practices which [2487] we have that are in turn incorporated in the so-called Burlington formula.

Q. Do I understand your suggestion to carry this inference: You believe the airlines should sit down and agree to a formula that might be applicable to the airline industry similar to what has been done by the American Association of Railroads, like the Washington Job Agreement?

A. In this case we don't feel there is an application for our so-called formula. We think down the road when the airlines are more or less stable and out of their growing stages and they are as stable as railroads, the airline should sit down and work out an intelligent procedure.

Q. The reason I ask that question is that I think you said a Burlington formula might establish a precedent which might be detrimental to the future. Did you have in mind a suggestion that the airlines confer on that like the railroads did and later came to agreement on the Washington Job Agreement and get a formula which would fit the industry as a whole?

A. A formula is dangerous to the strong, constructive growth of the airlines at this time, not only externally but internally. If they are considered consolidations, they are going to be hamstrung by formulas in effecting transfers. You don't know

(Testimony of Arthur F. Kelly.)

where formulas of this type stop. It could be a precedent for a schedule cut-back. There isn't much difference between the sale of a route or a seasonal decline in business, or a schedule cut-back. Wherever it happens, it affects employees involuntarily and then you want a standard formula practice to take care of them. I say this is [2488] not the time to apply this type of formula to the industry. I think the basic effect is an unwarranted employment insurance.

One of the risks in working for the airline business—this business isn't new. I worked in the airline business when United was buying Western in 1939 and '40. I was one of those guys that you are talking about that was sitting there thinking at times about what was going to happen to me. I felt if I have had the qualifications to come up to the standards of the purchasing company, I would make a go of it. I didn't want anybody exploiting my unemployment insurance or giving me charity because of my position.

Q. That was your personal view.

A. That is right.

Q. You realize that as time goes on, there will probably be many mergers and consolidations and so forth in this industry. Did you have in mind suggesting some formula applicable to the over-all proposition? If not, that is all I want to know. Do you think you should apply a formula to each particular case?

A. No, I haven't given it the thought that a lot

(Testimony of Arthur F. Kelly.)

of these people like Mr. Kennedy has given it. I have specific Western Air problems to take up my time.

Examiner Wrenn: Do you have any questions of this witness?

Mr. Reilly: No questions.

Cross-Examination

By Mr. Kennedy:

Q. Under the column "Reason," W-3, opposite the name [2489] of Mr. Seveik, and then opposite the name of several other people on the page, you have the word "Furlough." A. Correct.

Q. What is the explanation of that? That isn't the reason. That is just a fact.

A. You mean the sale of Route 68?

Q. No, above that. A. Furlough?

Q. Yes. A. Yes.

Q. You just say these gentlemen were furloughed and you don't explain why.

The request for evidence asked for a reason. In most other cases you have given a reason. But beginning on page 21, I think there are some 100 cases involved and you didn't give any explanation.

A. It was the general personnel cut-back without any external forces.

Q. In a number of places, you have "Reduction in staff" or "Reduction in force." Wouldn't that be the personnel cut-back you were talking about?

A. Possibly.

Q. It would be natural if that were the explana-

(Testimony of Arthur F. Kelly.)

tion to have used those words rather than the word "furlough."

A. These were taken from copies of individual station supervisors who have their own definitions. These are the words we took from the personnel records.

Q. Your answer is that you don't know what the explanation is? [2490]

A. I know the explanation why there is a change in the various reasons and classifications. I know that individual supervisors will come in on a personnel record and have their own interpretation as to why a person severed his job or why he is furloughed or why he is terminated.

Q. Do you know what the word "furlough" means here?

A. There is a slight difference between terminate or furlough. If a man is fired for cause or reason he is usually terminated. If a man has worked and is subject to seasonal cut-backs, we put him on a furlough status.

Q. I am clear as to that. That explains the distinction between a furlough and termination. What was the reason for the furlough, if you know?

A. I say the reason for the furlough, in my opinion, is general seasonal cut-backs, the normal personnel cut-back that was going on at that time.

Q. You can say of your knowledge Mr. Seveik was cut back because of general seasonal cut-backs?

A. I would say so, yes.

Q. And you can say the same thing of each of the 100 odd cases in addition?

(Testimony of Arthur F. Kelly.)

A. I would say it was a normal personnel cut-back, yes.

Q. And you say that of your own knowledge as to each case?

A. Not for each case. I say that is a matter of general company policy of personnel cut-backs at that time.

Q. Suppose the Board would decide that a Burlington formula or something along that general line was appropriate [2491] for the benefit of Western employees, do you have any thought who should bear the liability under that formula, whether it should be Western or United or divided between them?

A. I think I made my position clear on that; if the Board attached a so-called formula, Western Airlines, as far as their liabilities were concerned, would defer payment until such time as we were able to recapture it.

Q. Suppose the Burlington formula were imposed. On whom should the Board impose liability, Western or United or both of them?

A. I don't have an opinion on that.

Mr. Kennedy: That is all I have, Mr. Examiner.

Examiner Wrenn: Let us recess until 9:30 o'clock tomorrow morning. We will be in Room 5132.

(Whereupon at 4:40 p.m. the hearing was adjourned to reconvene on Thursday, November 17, 1949, at 9:30 a.m.) [2492]

(Testimony of Arthur F. Kelly.)

Proceedings November 17, 1949

Examiner Wrenn: Mr. Bennett, you may cross-examine the witness.

Whereupon

ARTHUR F. KELLY

was recalled as a witness on behalf of Western Airlines, Inc., and having been previously duly sworn, was examined, and testified further as follows:

Cross-Examination

By Mr. Bennett:

Q. What capacity did you say you were working in? A. At the present time?

Q. Yes. A. I am vice president—traffic.

Q. Previous to that, what title did you hold?

A. Executive assistant to the president.

Q. And previous to that?

A. General traffic manager.

Q. And your employment extends over what period of time, your whole employment?

A. In aviation?

Q. Yes; with Western Airlines.

A. Since 1946.

Q. I call your attention to W-1, pages 1 and 2. Did you prepare those documents?

A. These documents were prepared at the request of Public Counsel, and the information was prepared in our Accounting Department.

Q. Now, would you answer my question, [2497] please?

(Testimony of Arthur F. Kelly.)

Mr. Renda: If Mr. Bennett has any objection with respect to the balance sheet and wants to move to strike, let him make his motion. That is a consolidated balance sheet taken from our records as of September, 1948.

Examiner Wrenn: Read the question.

(Question read.)

The Witness: No, I did not prepare this document. I got it from my Accounting Department.

Q. (By Mr. Bennett): Are you sponsoring these two documents?

Mr. Renda: I think Mr. Bennett knows the witness is sponsoring that. The witness so testified on direct examination. There is no question about it.

Examiner Wrenn: Let him answer.

The Witness: I am sponsoring these exhibits. They were prepared at the request of Public Counsel.

Q. (By Mr. Bennett): You are sponsoring pages 1 and 2 of W-1? A. That is correct.

Q. Will you turn to pages 1 and 2 of W-2? Were those two documents prepared by you?

A. They were not actually prepared by me, no.

Q. But you are prepared to sponsor them, are you not?

A. I think they speak for themselves.

Q. Would you answer my question, please?

A. In general, I am prepared to sponsor these exhibits.

Q. I call your attention to the item of flight operation on page 2 of Exhibit W-2.

(Testimony of Arthur F. Kelly.)

A. Is that "flying operations"? [2498]

Q. Yes; operating expense. There is the item of flying operation. Does that item include the expense of pilot salaries? A. That is correct.

Q. How much of that is pilot salaries?

Mr. Renda: Mr. Examiner, I am going to object to this line of questioning with respect to this exhibit. This is a statement of profit and loss sponsored by this witness. It is being submitted pursuant to a request by Public Counsel. I do not see how cross-examination on a profit and loss statement is germane to the issues before us in this proceeding.

Mr. Bennett: Do you wish me to answer?

Examiner Wrenn: If you like.

Mr. Bennett: I think I have a right to ascertain the witness' qualifications by examining him upon any part of this exhibit. If he does not know, he can say as much. To test his knowledge of this exhibit I have a right to question him upon it.

Examiner Wrenn: Go ahead.

Mr. Renda: Let the record show with respect to exhibit 1 and Exhibit 2, the balance sheet and profit and loss statement, we would have no objection to withdrawing, to withdrawing those two exhibits. They are only in here because they were requested by Public Counsel.

Q. (By Mr. Bennett): Can you tell us what portion of that flight operation figure is "pilot salary"?

A. Generally speaking, a salary expense can be

(Testimony of Arthur F. Kelly.)

broken [2499] down in proportion to the system as a whole, and I would say that compared with overhead that would probably run around forty-five or fifty per cent of that.

Q. Thirty per cent of which figure would be the pilots' salary?

A. The consolidated figure. I am taking the figure of fifty per cent at the representative figure of what salaries as a whole for the company represent. Whether that applies specifically to that figure, I do not know. I am speaking of the company as a whole. Salaries represent about fifty per cent of our operating overhead. It might be pointed out in that particular item, the item of gas-line and oil and general expenditure of operating aircraft, might take that out of the proportionate percentage.

Q. What other airlines are comparable to Western Airlines?

Examiner Wrenn: Give him a little more indication of what you have in mind when you say "comparable."

Q. (By Mr. Bennett): There was some indication yesterday in the hearing that there were other airlines, certificated airlines, domestic airlines, that if any comparison was going to be made of Western should be made of these other comparable airlines. Are there domestic airlines in the United States that are comparable to Western?

Mr. Renda: I object unless he states in his question on what basis he wants to make the comparison.

(Testimony of Arthur F. Kelly.)

Q. (By Mr. Bennett): If you know. [2500]

Mr. Reilly: I object. The testimony that was elicited with respect to comparisons was to test the knowledge of the witness Unterberger, to test his knowledge of the airline industry.

Examiner Wrenn: Make the question more specific.

Q. (By Mr. Bennett): Let us take it in revenue miles first. Are there other domestic commercial airlines that are comparable?

A. Of course there are. Anyone that works in the industry knows that "comparable airlines" is merely a trade name. As soon as "comparable" is used, they immediately think of certain blocks of airlines. You have your Big Four, your medium-sized carriers and your small-sized carriers. In your comparable group you might include Mid-Continent, Delta and Chicago & Southern as an example of comparable carriers. That would extend from a period of several years. That would go from 1946 to 1949. For an example, Delta might step out. "Comparable" is a well-known trade term that anyone working in the business knows.

Q. What carriers are comparable to Western upon the basis which you indicated?

Mr. Renda: I object.

Mr. Reilly: I object to any questions along this line because I do not see any relevance as far as this witness' testimony in this case is concerned. How could any answer go to the issue of whether

(Testimony of Arthur F. Kelly.)

any pilots were adversely affected by the transaction here involved?

Mr. Bennett: I want to make certain he is through with his objection. [2501]

Mr. Renda: I have not made my statement yet.

Mr. Bennett: I would like them to get through.

Examiner Wrenn: I have told you to go ahead.

Mr. Bennett: Mr. Kelly has indicated that he is sponsoring this exhibit. He indicated he has been in the industry for many years. I think I have a right to test his knowledge of the industry by such questions.

Examiner Wrenn: Are you merely testing his qualifications?

Mr. Bennett: That is right.

Examiner Wrenn: Go ahead.

Mr. Bennett: Read the question.

(Question read.)

Mr. Renda: I object on the ground that the question is not specific. He should set forth the basis.

Examiner Wrenn: Make your question specific.

Q. (By Mr. Bennett): Upon the basis you indicated in your answer a few moments ago, will you tell us what other domestic commercial airlines are comparable to Western?

Mr. Renda: I object. If counsel cannot set forth the basis he wants, he can withdraw it.

Examiner Wrenn: Make your question specific and I will direct him to answer it.

(Testimony of Arthur F. Kelly.)

Q. (By Mr. Bennett): I believe you testified yesterday, Mr. Kelly, that no pilots on Western Airlines were adversely affected by the sale of Route 68; is that right?

A. That is correct. [2502]

Q. If you were discharged or furloughed from your job today, would you consider yourself adversely affected?

A. It would depend on whether it was voluntary or involuntary.

Examiner Wrenn: Read the question.

(Question read.)

Q. (By Mr. Bennett): Would you answer, please?

A. Sometimes in the airline business a lot of people think it would be a good idea if you went out and got a job which was more remunerative.

Q. Will you answer my question?

A. That is my answer.

Q. Would you answer my question Yes or No? Would you consider yourself adversely affected if you were furloughed from your job or discharged today?

A. If I had a job that paid me $3,000 a year more than I am making now, could I consider myself adversely affected? That is the basis of my answer.

Mr. Bennett: I do not want to argue with the witness. May he be directed to answer my question?

Mr. Renda: He does not have to answer Yes or No. He can qualify it.

(Testimony of Arthur F. Kelly.)

Examiner Wrenn: Answer the question to the best of your ability.

The Witness: In my position in the aviation business, not having any other place to go, I would consider myself adversely affected. [2503]

Q. (By Mr. Bennett): Did you hear Mr. Horne testify that he was demoted from Reserve Captain to Co-pilot? A. I think that is correct.

Q. Do you remember his testifying that he was so demoted because two of the pilots from Route 68 moved into his base and by reason of their seniority he was pushed back or demoted to Co-pilot?

A. Yes; and I was extremely puzzled about it. I was puzzled because——

Q. That is enough.

Mr. Renda: You asked him a question; let him answer.

Mr. Bennett: I do not want him to make a speech.

Mr. Renda: If that is responsive, the witness can continue.

Q. (By Mr. Bennett): Do you think Mr. Horne was adversely affected?

A. My reaction is that I was puzzled. At the time he made that statement——

Mr. Bennett: I did not ask that. I do not care if he was puzzled.

Examiner Wrenn: Let him finish his statement.

Mr. Bennett: I do not think that the witness should be permitted to make a speech every time he has a question put to him. I only want an answer.

Examiner Wrenn: I am going to get you an

(Testimony of Arthur F. Kelly.)

answer, Mr. Bennett, if you will let me.

Mr. Bennett: Read the question.

(Question read.)

Examiner Wrenn: Do you regard Mr. Horne was adversely [2504] affected?

The Witness: At the time he made that statement I was extremely puzzled because, being familiar with the schedule cut-backs, namely, one schedule off between Billings and Great Falls, and around that time between Rapid City and Sheridan, I would assume that would have some effect. Because of schedule cut-backs he probably was adversely affected.

Mr. Bennett: Then your answer was, he was adversely affected?

Mr. Renda: I think he has answered it.

Examiner Wrenn: Read the last statement.

(Answer read.)

Q. (By Mr. Bennett): I think you read from some notes yesterday the earnings of some twenty-odd pilots. Have you those notes with you?

A. I think I have.

Q. Do those notes disclose the earnings of Mr. Horne?

A. No. We had no record of Mr. Horne in your exhibits, so we made no study of it.

Q. Were the notes from which you read those earnings made by yourself?

A. In conjunction with our Accounting Department, yes.

(Testimony of Arthur F. Kelly.)

Q. Will you explain that, please, "In conjunction with the Accounting Department"?

A. I had to go there to solicit the help of our Accounting people to accumulate the salary information.

Q. Were the notes you read from accumulated by the Accounting Department or by [2505] yourself?

A. By me.

Q. Did you take them from the books of the company? A. That is correct.

Q. You made a notation of the amount?

A. That is correct.

Q. These notes that you are reading from are the memos you made from the Accounting Department books? A. That is correct.

Q. May I see them, please?

Mr. Renda: Just a minute, please. I have no objection to showing Mr. Bennett any figures he wants to see, but he is not going to see this man's notes.

I hate to have to do this. Here is Mr. Horn. Here is Mr. Hale. Here is Mr. Peterson.

Q. (By Mr. Bennett): Did you draw any conclusion from the figures that you read off to us yesterday?

A. I do not think I did. I think I just submitted the figures, that is all.

Q. Do you know what the purpose of submission of the figures would be?

A. Only to take the pilots that were selected

(Testimony of Arthur F. Kelly.)

by A.L.P.A. Exhibits who were adversely affected, and make a study and see if they were allegedly adversely affected.

Q. By the comparison of the annual earnings to see if they were in fact adversely affected?

A. We just wanted to find out if the A.L.P.A. was going to use a monetary yardstick. We wanted to know.

Q. Is that what the testimony showed, in your opinion? [2506]

Mr. Renda: I object. The testimony speaks for itself.

Examiner Wrenn: Certainly he has a right to find out what the witness is trying to prove by it. I am interested in knowing whether he wants the Board to believe that Western is saying here that the pilots were not adversely affected—if he can answer that. I do not want to put any words in his mouth.

Mr. Renda: I thought he answered that.

Examiner Wrenn: Is it Western's position that there is no conclusion to be drawn from it? If that is it, it is all right.

The Witness: We have been concerned as to the claims of A.L.P.A., as to whether people were adversely affected. If the monetary yardstick was going to be used, we took a list of the names of pilots A.L.P.A. selected that were adversely affected and drew that yardstick up to find out from a monetary if they were adversely affected. We only present these for the Board to look at and to consider.

(Testimony of Arthur F. Kelly.)

Examiner Wrenn: Is Western asking the Board to draw any particular conclusion?

The Witness: Certainly we are.

Examiner Wrenn: What is it?

The Witness: No pilots were affected by the sale of Route 68.

Examiner Wrenn: All right.

Q. (By Mr. Bennett): We have to start with earnings from Route 68?

A. No, I think you have to look at it from the standpoint of the entire system of Western Airlines. [2507]

Q. Which one of those figures, 1946, 1947 or 1948, represents the earnings of those pilots from Route 68?

A. Well, I think the pilots that were flying Route 68 that were in this exhibit. It is reflected in their total yearly salary.

Mr. Bennett: Read the question.

(Question read.)

The Witness: I did not go into any specific detailed study as to where this money was earned. I went into a study of what a pilot made for a given year to find out if he was adversely affected.

Q. Do you know what the issue is in this case, Mr. Kelly? A. I think I do.

Q. It is to ascertain if the sale of Route 68 adversely affected any pilots.

A. I think that is substantially correct.

(Testimony of Arthur F. Kelly.)

Examiner Wrenn: Let us be clear that that is the issue you are discussing.

Mr. Bennett: Yes.

Q. (By Mr. Bennett) These pilots about whose income you testified were pilots who were flying Route 68, is that correct?

A. I think they were.

Q. Basically, I take it the exhibit would seem to demonstrate that the earnings from Route 68 and the earnings afterwards were the same or more, is that true?

A. We just made a year to year study as to whether the pilot was adversely affected in flying the routes of Western Airlines. [2508]

Q. Which of the earnings represent the pilots earnings from Route 68?

A. I have not made that detailed study.

Q. You do not know? A. No.

Q. None of these pilots flew the entire year of 1947 on Route 68?

A. No. The route was transferred on September 15.

Q. So that the 1947 earning would not represent earnings for the year 1947 from that route, is that true?

A. That is substantially correct.

Q. So that there is not any basis of comparison between these figures as to what they earned on 68 or some other route? A. That is true.

Q. Did the earnings of these individuals in 1948 also include increases in compensation?

(Testimony of Arthur F. Kelly.)

A. The general scope of salary, I think, yes.

Q. Do you know that they were increased?

A. I think this reflects a general adjustment that might have been effected on their salary.

Q. What was the increase?

A. Do you mean in retroactive flying pay?

Q. Yes; the monthly increase of pilot compensation. What was the monthly increase in pilot compensation between 1947 and 1948?

A. It varied according to where the pilot was flying and what he was flying.

Q. Take the co-pilot. He gets a flat salary, does he not? [2509] A. That is correct.

Q. What was his increase?

Mr. Renda: The contract is stipulated. It speaks for itself.

The Witness: I will read it out of the contract. I have a copy of the contract.

Examiner Wrenn: Go ahead.

Mr. Bennett: I do not think the contract will show the increase. It will only show the salary.

The Witness: Here is the minimum pay for co-pilots. Do you want me to read from the first to the fifth year?

Q. (By Mr. Bennett): I want to know the increase.

A. The first six months $285. Second, $305 per month on up to the fifth year, to the tenth six month, $500 per month.

Examiner Wrenn: How much of an increase is that over what they had?

(Testimony of Arthur F. Kelly.)

The Witness: I do not know. All I know is what the salaries were in these contracts.

Q. (By Mr. Bennett): What were the salaries in 1947?

A. I am not familiar with that figure.

Q. Have you got a contract for 1947?

Examiner Wrenn: I am perfectly willing to let you bring that in through your witness. The witness testified he did not know.

Q. (By Mr. Bennett): You do not [2510] know? A. No.

Mr. Bennett: I will withdraw the question.

Examiner Wrenn: You can let it stand.

What do you want to do?

Mr. Bennett: Let it stand. He does not know.

Q. (By Mr. Bennett): Mr. Kelly, you indicated in your testimony yesterday that when Mr. Drinkwater assumed the presidency of Western Airlines that Western Airlines was overstaffed. I believe you said as much.

A. I think that was an understatement.

Q. Beginning in 1946 there was a steadily reduced employment?

A. I said at the end of 1946.

Q. Yes. You said that trend has continued. Is that right? A. That is correct.

Q. Would that statement hold true of the airline pilot personnel of Western Airlines together with the other employees?

A. Not quite to the degree that the other classifications were reduced.

(Testimony of Arthur F. Kelly.)

Q. To what degree was Western overstaffed in pilot employees?

A. I could not answer that question without getting into a more complete study.

Q. You do not know? A. No.

Q. I think you also testified that Western Airlines [2511] had an annual fluctuation of employment? A. Seasonal fluctuation.

Q. It is also annual, is it not?

A. That is correct.

Q. This fluctuation was a normal thing, is that true? A. Fairly normal.

Q. I think you also stated that you had a normal cut-back season? A. Up to 1948, yes.

Q. What is a normal cut-back in pilots annually or seasonally?

A. As I recall, it depends on how many schedules you are flying and how many you cut off. In 1946, as I recall it, we furloughed in the winter about 45 pilots. In the fall and winter of 1947 we furloughed about twenty-one pilots. We furloughed about the same number in the fall of 1948.

Q. As I understand your answer, there were one hundred per cent more pilots furloughed in 1946 than there were in 1947?

A. I think that figure is substantially correct.

Q. So that when you say there is a normal cut-back annually, that is not exactly what you mean?

A. No. It depends upon the scope of your operations. If you take off ten schedules, you are going to take off more pilots. If you take off five schedules, you take off fewer pilots.

(Testimony of Arthur F. Kelly.)

Q. It differs from year to year, is that correct?

A. That is correct.

Q. So there is no normal cut-back. The only normal [2512] thing is that there is a cut-back annually?

A. Yes. It might be in a different month each year. It depends on business.

Q. In any event, there is no normal number annually? A. No exact number, no.

Q. Will you look at your Exhibit WA-1, please?

A. Yes.

Q. I direct your attention to Mr. Babcock who is the first pilot employee named on that exhibit. Will you tell us why he was furloughed, please?

Mr. Renda: I object. I would appreciate it if Mr. Bennett would say furloughed on what date.

Mr. Bennett: I will withdraw the question.

Examiner Wrenn: Very well.

Q. (By Mr. Bennett): I direct your attention to the remarks after M. M. Babcock. Mr. Babcock was a pilot, was he not?

A. That is correct.

Q. The remarks following his name say, "furloughed 9/22/48, Convair Program complete, scheduled reduction." Do you know whether he was furloughed because of schedule reduction or because the Convair Program was complete?

A. He would have been furloughed because of schedule cut-backs if we did not have the Convair Training Program.

Q. But you had it.

(Testimony of Arthur F. Kelly.)

A. That is correct. In the fall of 1948 we had the Convair Training Program.

Q. He was actually furloughed because the program was complete? [2513] A. Yes.

Q. That is not a seasonal cut-back, is it?

A. That is a temporary operational phase of our business. If we hired him to fly charter or extra section or something temporary in nature, it would not be a permanent job. If the seasonal fluctuation was going to affect him, he would not have a job.

Examiner Wrenn: Read the question.

(Question read.)

Mr. Renda: I believe he has answered.

Examiner Wrenn: What was his answer?

Mr. Bennett: He would say one or the other.

Mr. Renda: May I have the answer?

(Answer read.)

Examiner Wrenn: Was it because of the Convair Program or because of a schedule reduction?

The Witness: At this time, I would say because of the Convair Training Program.

Q. (By Mr. Bennett): That is not a seasonal reduction? A. No.

Q. Take the next one, Mr. Howard Critchell. The remark says, "Furlough, Completion of Convair Training Program 8/31/48, rehired 9/1/48 as new crew schedule——" That furlough was not a seasonal cut-back, is that true?

(Testimony of Arthur F. Kelly.)

A. That is correct. He finished his Convair Training Program.

Q. Now, Mr. Edgerton. I call your attention to his furlough on August 31, 1948. That was not a seasonal cut-back? [2514]

A. He was temporarily hired in the Convair Training Program.

Q. The same is true with Mr. Fitzgerald, he was terminated? A. That is correct.

Q. Mr. Allen Funkey, who was furloughed August 31, 1948. That was due to Convair completion?

A. Due to the Convair Training Program.

Q. That was not a seasonal cut-back?

A. No.

Q. Mr. Robert Hippe, he was furloughed on August 31, 1948. That same thing is true as to him?

A. He was furloughed after the temporary Convair Training Program.

Q. Yes. Let us turn to W. R.-2, if you please. Can you tell us why July 6 was chosen for a comparison? I am not sure whether or not you answered it. I would like to have you answer again because I do not remember.

A. In our informal conference with the Board on this subject, this was the figure that A.L.P.A. stated was a normal operating month. We do not agree that that was a normal operating month for the system.

(Testimony of Arthur F. Kelly.)

Q. What month would you choose as being normal?

A. It is difficult to actually select a normal month. In July you are in the peak of your summer business. It is difficult to select a typical normal month. For comparative purposes we would use it.

Q. Do you think July is fair?

A. No, I think it is above average. [2515]

Q. Which month would you choose to be fair?

A. Normally I would consider the first fifteen days of May and the first days of June. In the past year, 1949, June was substantially over July so far as traffic generally was concerned. It was an unusual year. It was difficult to forecast.

Q. If the period that you indicate was taken, can you tell us if the aircraft miles flown in 1948 would not also indicate a substantial reduction?

A. I have not made a study of that.

Q. You mean you do not know?

Mr. Renda: He has not answered the question.

The Witness: Yes; at the time.

Q. (By Mr. Bennett): I show you our Exhibit No. 2, which indicated the aircraft miles flown for May and June, 1947, and May and June of 1948. I ask you to state if it does not show a substantial reduction?

A. Yes, I think this shows a substantial reduction, but I would like to make mention of the fact that I have not examined this study on statistics and I have not my slip stick here to work

(Testimony of Arthur F. Kelly.)

out any rebuttal answers, but I might add this to my answer and that is, while in May and June of 1947 we were flying more aircraft miles than we were in 1948, we were losing substantially more money.

Q. Have you anything with which you could substantiate that statement?

A. I think if you start back with 1946 it was well over $1,000,000. Through 1947 our operating loss was $975,000 [2516] and in 1948 when our operating profit was about $150,000—It seem during 1946 and 1947, with costs the way they were, the more money we were losing. It was a matter of reducing our cost and solidifying our operation and making it stable.

Q. The less miles you fly, the less pilots you need, is that true?

A. I think that is a fair statement.

Q. When the mileage flown is substantially reduced, it is necessary in the interest of economy for the company to furlough from the seniority list? A. That is correct.

Q. In that case, Mr. Kelly, would you not say that the pilots furloughed are adversely affected?

A. Well, that depends upon why they were furloughed.

Q. You mean if a man loses his job, the fact would affect whether or not he was adversely affected?

A. I don't think substantially. In answer to your question, you have to examine why the man was furloughed.

(Testimony of Arthur F. Kelly.)

Q. Assume a man is furloughed because the company reduces its schedules and he does not draw his pay any longer. Would you say then he is adversely affected?

A. I would say he would be adversely affected on that basis. I would say he was affected on that basis.

Q. You would not say he was adversely affected?

A. Yes, he would be adversely affected.

Q. Whatever the reason, Mr. Kelly, if a man loses his job so his pay stops, do you not think he is adversely affected?

A. Yes, I think that is a fair statement.

Q. I believe you also stated yesterday that you had [2517] made a study or survey which convinced you that Route 68 would support but two schedules, is that true?

A. I would have to go into some more detail on that.

Q. Will you do that, then?

A. I was scheduling our aircraft in July of 1947. I mean in the spring and summer of 1947. I received a directive from our management in the scheduling of our aircraft that several factors would be considered. One was the fact that there were——

Q. Pardon me. I hate to interrupt you, but did you say that you had received orders from some department that several factors would be considered? A. That is correct.

(Testimony of Arthur F. Kelly.)

In my future course of action in the scheduling of our aircraft, to schedule them according to my best judgment—One, we were getting ready to start the San Francisco-Seattle operation on August 1st.

Second, a very careful reading on the load factors would be carried through from August through the fall of 1947.

Third, because of the precarious financial position of Western Airlines at that time, I would be required to study the utilization of that aircraft pointed toward the possibility of selling some of that aircraft to meet some of the pressing debts of Western Airlines at that time.

The fourth factor was that I would consider this a normal operation assuming the fact that we were not going to sell Route 68.

Approximately at that time there was a considerable difference of opinion within our own company as to [2518] whether the sale of Route 68 was actually going to be approved. There was a substantial amount of difference of opinion as to whether it was. So my job in the scheduling of aircraft was one of a certain degree of normalcy that I welcomed in my future course of action in scheduling our aircraft. On August 1, although load factors were high on Route 68, going through the fall on a fairly permanent schedule, it was my opinion, borne out further down the line as the load factor started to slip, and as we were faced in August with one of the worst airline tragedies in history, the Bryce Canyon accident, which later

(Testimony of Arthur F. Kelly.)

proved detrimental to load factors that fall, the pattern of three trips from Los Angeles-San Francisco to Seattle was set up—nine trips including the Seattle-Los Angeles segment and two trips were set up on the Los Angeles-Denver segment. We were starting to feel some penetration as far as the non-stop operation of United was concerned. That generally was the problem which was given to me in the summer of 1947.

Q. I think you stated yesterday that you evaluated certain factors and came to the conclusion that 68 would support about two trips. Is that your testimony?

A. That is correct. I think that was fairly well borne out by United's operation the following summer when they were flying two trips.

Q. How many trips are being flown today?

A. Three trips.

Q. And one cargo trip? A. Yes.

Q. So that there are four trips flown? [2519]

A. If you want to consider that a Los Angeles-Denver run, you can, but it is a Los Angeles-Denver, Chicago, New York run.

Q. You say you came to this conclusion in 1947?

A. No. We have to set up schedules sometimes twenty-five days in advance.

Q. So it was previous to that time?

A. It was in July.

Q. During the time that you were contemplating all these factors, there were four trips being flown on 68? A. That is correct.

(Testimony of Arthur F. Kelly.)

Q. Is it not true that two planes which were making two trips on 68 were moved over to 63 on the extension? A. That is correct.

Q. We have information that indicates that there were people who were not able to fly on 68 because there was no seat for them. Are you aware of that factor?

A. Yes. During August that same problem existed between Los Angeles and San Francisco.

Q. Do you know how many passengers you turned down after you took those two trips off?

A. No; I do not have a record of that.

Q. You know that there were some?

A. We have a high density segment involved between Los Angeles and Las Vegas. We used one of our non-stops as a flag stop, flagging the non-stop into Las Vegas to take care of the local Los Angeles-Las Vegas passengers.

Q. You say that one of the factors you took into consideration was the accident that occurred in Bryce Canyon? [2520]

A. That was one of the factors that affected load factors. I think that accident happened sometime in August. But it had a general effect on our fall business.

Q. If I told you it happened in October, could that be correct?

A. Possibly. It happened generally around the fall season.

Q. It was after you sold Route 68 that that occurred?

(Testimony of Arthur F. Kelly.)

A. I do not have the exact date. I remember it had an affect on our fall business.

Q. Did you consider that accident?

A. No; just in future load factors. I was not sure I remembered what time in the fall this accident affected fall business.

Q. Did you not state at some stage along the line you took the Bryce Canyon accident into consideration in your dealing with Route 68?

Mr. Renda: I object.

The Witness: No.

Examiner Wrenn: Wait a minute. I want to get the basis of Mr. Renda's objection.

Mr. Renda: On his cross, that is not one of the things Mr. Kelly said he took into consideration.

The Witness: No, I did not take it into consideration. I was enumerating various factors that had an effect. I recall this accident had a substantial effect on our load factor.

Q. (By Mr. Bennett): On 68? [2521]

A. No; on all the routes.

Q. That has nothing to do with 68?

A. No. Our wisdom of schedule cut-backs was accentuated as a whole by virtue of the business we lost on this accident.

Q. That was a happenstance?

A. Correct.

Q. Mr. Kelly, what were the average number of pilots that you had working from 1947, do you know?

A. No, I do not know.

(Testimony of Arthur F. Kelly.)

Q. Let us turn to your Exhibit W.P.-4.

Mr. Renda: We do not have a W.P.-4.

Mr. Bennett: W. R.-4.

Q. (By Mr. Bennett): What does that exhibit demonstrate, please?

A. I testified in my direct testimony that this demonstrates a seasonal fluctuation in our pilot requirements and our flying requirements.

Q. That is what the exhibit was presumed to show?

A. That is what I stated in my direct testimony.

Q. If an airline is engaged in a training program and they fly a large number of hours in training, those are non-revenue hours, is that correct?

A. That is correct.

Q. That requires additional pilots as though it were revenue hours? A. That is correct.

Q. 1946 was the year in which Western Airlines began operations on Route 68, is that true?

A. That is true. [2522]

Q. Is was necessary, I take it, to train pilots on that route, is that right?

A. That route; and keep pilots qualified for other routes, too.

Q. But that training program on Route 68 was not the usual training program, was it?

A. It was the same as our Convair Program.

Q. You did not carry on a Convair Training Program every year?

A. No, we do not carry on a C-4 Program every year.

(Testimony of Arthur F. Kelly.)

Q. What other training program did you have in 1946 besides the training for Route 68, that is, that was not the ordinary training program?

A. I think that the only major one that was going on.

Q. That was the only major one?

A. Yes.

Q. What major training program, if any, did you have in 1947?

A. I do not think we had any.

Q. What major training program did you have in 1948? A. The Convair.

Q. So that in both 1946 and 1948 you had major training programs?

A. I believe that is substantially correct.

Q. Let us look at Exhibit WR-4. Does it show how many pilots were employed in January of 1947?

A. I would estimate on this chart about 125.

Q. How many in January of 1948?

A. I would roughly estimate about 98. [2523]

Q. The number of pilots in January of 1948 was substantially lower than the number in January, 1947? A. That is correct.

Q. Let us take February, 1947. How many pilots were there? A. I would say about 121.

Q. How many were there in February of 1948?

A. I would say about the same, about 98.

Q. When you say "the same," you do not mean the same as 1947?

(Testimony of Arthur F. Kelly.)

A. No; the same as January, 1948.

Q. In other words, there were substantially fewer pilots? A. That is correct.

Q. What about March?

A. I would say—March of 1947?

Q. Yes.

A. I would estimate that as about 105.

Q. What about March of 1948?

A. About 96.

Q. How many were there in April, in 1947?

A. Probably 103.

Q. How many in 1948? A. About 95.

Q. How many were there in May, 1947?

A. 110 or 111.

Q. How many were there in May of 1948?

A. About 110.

Q. How many were there in June, 1947, and June, 1948? [2524]

A. June, 1947, about 117.

Q. Would you look at that——

Mr. Renda: Mr. Examiner, if it would help Mr. Bennett's case any, we will be more than glad to submit the data which will set forth exactly the number of pilots which were on in the months starting with 1946 through 1949.

Mr. Bennett: I think I have a right to conduct my examination in any way I see fit.

Examiner Wrenn: You do. Do you want that information?

Mr. Bennett: No.

Mr. Kennedy: I think it would be helpful.

(Testimony of Arthur F. Kelly.)

Mr. Bennett: It is right before us.

Mr. Renda: Then why are we going through all this?

Mr. Bennett: I want it specifically set forth, if I can.

Do you want to furnish that to Public Counsel?

Mr. Renda: I made the offer to the Examiner, if any of the parties want it. The best the witness can do is estimate. I can give you the specific numbers, if you want them.

Examiner Wrenn: Did you make a request for it, Mr. Kennedy?

Mr. Kennedy: Yes. I want the information for the record, not for myself.

Examiner Wrenn: Is there any objection by any party to that being furnished after the close of the hearing?

Mr. Bennett: I have no objection.

Examiner Wrenn: All right. Go ahead and furnish it at the same time, within fifteen days.

Mr. Renda: Any variances between our records and Mr. Kelly's guesses will speak for [2525] themselves.

Examiner Wrenn: Yes.

Mr. Bennett: The submission will be for the number of pilots on the pay roll by months for both 1947 and 1948.

Mr. Renda: And 1946.

Q. (By Mr. Bennett): Will you examine the chart from January through August, 1947, and 1948? A. All right.

(Testimony of Arthur F. Kelly.)

Q. Calling your particular attention to those months, is it not true that in every one of those months in 1948 there were fewer pilots than there had been in 1947?

A. They look about the same.

Q. In every month there were fewer pilots?

A. Yes.

Examiner Wrenn: Does any other counsel have a question?

Mr. Kennedy: I have just one.

Examiner Wrenn: Proceed.

Cross-Examination

By Mr. Kennedy:

Q. What was the seating capacity of Western's DC-4 on Route 68?

A. Generally speaking, 44.

Q. Do you know the capacity of United's DC-6s on that route?

Mr. Reilly: Fifty.

The Witness: I was going to say approximately fifty.

Mr. Kennedy: That is all.

Mr. Reilly: May I ask one question of Mr. Kennedy? Has everyone signed the stipulation, Mr. Kennedy? [2526]

Mr. Kennedy: Yes.

Examiner Wrenn: I am interested in a remark you made in answer to a question by Mr. Bennett. Why do you think there was considerable differ-

(Testimony of Arthur F. Kelly.)

ence of opinion among the Board about whether the sale would be approved?

The Witness: I suppose that was hearsay. I meant there was considerable difference of opinion in our Board.

Examiner Wrenn: There had been no expression by the Board or the Examiner in the form of a tentative opinion?

The Witness: No.

Examiner Wrenn: There is one other point I would like to get clear. I understood your testimony to be that Western does not consider that there has been any adverse effect on the employees, but if the Board should find that they have been adversely affected and impose a condition on there, particularly in the form of monetary payment, that Western could not make any such payment until they came back here and presented the issue in a mail rate case. Am I correct?

The Witness: You are substantially correct in that.

Examiner Wrenn: Then in substance, wouldn't that amount to Western saying they would not make the payment, that it would be up to the Government to make it in the form of mail pay?

The Witness: The position we take on that is one of necessary consistency. At the present time the Post Office's position, as I understand it, is one where they are using the so-called profit of the sale of Route 68 as an off-set of our retroactive mail pay. It would be inconsistent for us not

(Testimony of Arthur F. Kelly.)

to take this as an issue before the Board and the Post Office [2527] Department.

Examiner Wrenn: Do you mean Western would want an adjustment of that item in dispute that you say the Post Office Department is insisting you offset? Is that the substance of your testimony?

The Witness: That is correct.

Examiner Wrenn: I did not get that impression. I do not know if the record is clear.

Mr. Renda: May I clear the record?

The Witness: Yes.

Mr. Renda: There is presently pending a mail rate proceeding covering a retroactive period of May 1, 1944, through December 31, 1948. In that proceeding the Board has issued a tentative statement of findings and conclusion, and one conclusion was that a profit on the sale of Route 68 was all revenue, therefore mail pay should be subtracted from it. If the Board prevails and that decision is final, it is our position that if any reimbursement should be made to any employees, it should be made for by the Government through subsidy, whereas on the other hand, if we are permitted to retain the profit on the sale, then any charges like income or anything else is an obligation of the carrier.

Examiner Wrenn: I was going to ask a question further about it, but I can see your position on it. I could not see what you had in mind.

(Testimony of Arthur F. Kelly.)

Are there any further questions of this witness before tendering him for redirect?

(No response.)

Examiner Wrenn: Proceed with [2528] redirect.

Redirect Examination

By Mr. Renda:

Q. With respect to your testimony as to the earnings of the various pilots which are named in ALPA Exhibit No. 1, is it the position of the company and your testimony that the earning information which you have testified to is conclusive proof that in a dollar and cents test, those pilots were not adversely affected by reason of the sale of the Route 68? A. That is correct.

Mr. Bennett: This is direct testimony.

Examiner Wrenn: It is redirect.

Mr. Bennett: I do not think he should make the statements and have the witness answer Yes or No. It is a leading question.

Examiner Wrenn: You are correct that it is leading, but of course that is not the only leading question that has been asked during this proceeding.

Mr. Bennett: If he wishes to be sworn and testify, that is one thing. He asks a question of about five minutes duration and the witness says Yes or No, and that is all that there is to it. I prefer to ask that Mr. Renda ask a question rather than

(Testimony of Arthur F. Kelly.)

make a statement and have the witness answer Yes or No. I would die trying to get a Yes or No answer, and he does not have any trouble.

Mr. Renda: I will try to ask questions which conform to the rules of evidence.

Examiner Wrenn: Proceed.

Q. (By Mr. Renda): Mr. Kelly, the figures which you gave for each specific year, earnings figure, contained the allocated monthly [2529] retroactive pay adjustments? A. Yes.

Q. That retroactive monthly pay adjustment goes back to what year or period?

A. I think the first payment was to Captain Stephenson about April of 1946.

Q. Do the earnings for each year represent the total earnings by total flying time?

A. Yes, they do.

Q. You read into the record the pay scale for co-pilots? A. Yes.

Q. What is the date of that contract?

A. Effective November 16, 1940, as amended to January 1, 1949.

Q. Will you please refer to Western Exhibit No. 9, Page 6, and indicate whether the pay scale is the pay scale which was in effect in 1947? It is not necessary to read it.

A. That is correct.

Q. With respect to Counsel for ALPA's question as to normal cut-back, is it your testimony a cut-back in pilot personnel has resulted in the fall of each year 1946, 1947 and 1948?

(Testimony of Arthur F. Kelly.)

A. That is correct, we have had a pilot cut-back in each one of those years.

Q. And the number has varied or has not?

A. The number has varied.

Q. That is dependent on what factor or factors?

A. Seasonal fluctuations more than anything else.

Q. Does the question as to the number of schedules [2530] which you eliminate have anything to do with the number of pilots furloughed at the end of each seasonal cut-back? A. Yes, it does.

Q. Will you please turn to Exhibit WR-1? Will you also turn, at the same time, to Exhibit W-8, and indicate if in Exhibit W-8, which is the letter of September 4 advising as to the furloughing of certain pilots, there are contained the names of the following pilots about which Mr. Bennett asked you: Babcock, is his name on Exhibit W-8?

A. Yes.

Q. Critchell? A. Yes.

Q. Edgerton? A. Yes.

Q. And Hippe? A. Yes.

Q. Refer again to WR-1. Other than those pilots you have just now named, were the others furloughed due to seasonal schedule cut-back?

A. That is correct.

Q. Is there any month in the year which in the airline industry is regarded as a normal month?

A. No.

Q. Are there any two months in a year that

(Testimony of Arthur F. Kelly.)

are usually regarded for comparative purposes as average months?

A. No. I think it fluctuates from year to year.

Q. Is it your testimony that certain employees of Western were adversely affected by reason of the sale of Route 68? [2531] A. No.

Mr. Bennett: I think that is a conclusion which we have to draw from whatever he has said. I think it calls for a conclusion.

Examiner Wrenn: Don't you think it would be helpful to have his conclusion?

Mr. Bennett: Not the way he is going to give it. It would not mean anything to anybody.

Mr. Renda: It is my witness, Mr. Bennett.

Mr. Reilly: Why be concerned if it does not mean anything?

Examiner Wrenn: You may answer.

The Witness: My answer is no one was affected by the sale of Route 68.

Q. (By Mr. Renda): Mr. Bennett queried you about a situation where a pilot is furloughed and therefore draws no pay. He asked you if that individual is adversely affected. You answered he was. Be that as it may, it is important to ascertain whether the reason for the furlough was due to the sale of Route 68?

Mr. Bennett: I do not understand the question.

Mr. Renda: I will rephrase it.

Examiner Wrenn: Proceed.

Q. (By Mr. Renda): You are familiar with

(Testimony of Arthur F. Kelly.)

the fact that one of the issues in this case is whether or not employees were adversely affected by reason of the sale of Route 68. Is it your testimony that a pilot could be furloughed and thereby be adversely affected and still not be adversely affected by reason of the [2532] sale of Route 68?

A. That is the point I was trying to make in expanding my answer to Mr. Bennett. That certainly is correct.

Q. With respect to the training program on Route 68, that you were queried on by Mr. Bennett, was there a DC-4 Training Program on in 1946?

A. I think training was going on all through the year. As far as a specific program specified for a specific date, it is difficult to say.

Q. Was it necessary for the pilots to qualify for Route 68 before flying it?

A. I think that is normal procedure.

Q. Was it necessary for the pilots to qualify over Route 63 north of San Francisco before flying it in 1947? A. That is correct.

Q. Was it necessary for the pilots to qualify over the route extending from South Dakota, Minneapolis, St. Paul and Rochester? A. Yes.

Q. Was it necessary for pilots to qualify for the Rapid City-Sheridan cut-off in the spring of 1947 before flying it? A. That is correct.

Mr. Renda: No further questions.

Examiner Wrenn: Do you have any further questions, Mr. Bennett?

(Testimony of Arthur F. Kelly.)

Mr. Bennett: I have no further cross-examination.

Examiner Wrenn: You may be excused. Thank you.

(Witness excused.) [2533]

Mr. Renda: Western offers W-1 through 18; WR-1 through 7; and WX-1 through 5.

Examiner Wrenn: Is there any objection? Hearing none, they will be received in evidence.

(The documents referred to as Western Exhibits W-1 thru W-18; WR-1 thru WR-7; and and WX-1 thru WX-5 were received in evidence.)

Examiner Wrenn: Does that complete your case?

Mr. Renda: Yes.

Examiner Wrenn: Before we start United, let us take a five minute recess.

(Recess taken.)

Examiner Wrenn: On the record. Let us proceed with United's case.

Whereupon

C. F. McERLEAN

was called as a witness by and on behalf of United Air Lines, and having been first duly sworn, was examined and testified as follows:

(Testimony of C. F. McErlean.)

Direct Examination

By Mr. Reilly:

Q. Please state your name and address?

A. Charles F. McErlean, 8515 Indiana Avenue, Chicago, Illinois.

Mr. Reilly: I have handed to the Examiner two copies of a booklet which is entitled, "Before the Civil Aeronautics Board, Exhibits of United Air Lines, Inc., Docket No. 2839." It bears the date November 15, 1948. This booklet contains exhibits which are identified on the first page of the [2534] booklet U-1 through U-15.

The data contained in these exhibits is being submitted for this record at the request of Public Counsel.

On October 11, 1947, we had a pre-hearing conference in this matter. Exhibits U-2 and U-3 are responsive to Public Counsel's request number two in that pre-hearing conference.

Exhibit U-4 is in response to Public Counsel's request number one at that conference.

Exhibit U-5 is in response to Public Counsel's request three in that conference.

Exhibit U-6 and U-7 are responsive to Public Counsel's request four.

U-8 through 15 are responsive to Public Counsel's request number five at that conference.

I ask, Mr. Examiner, that the documents contained in the booklet be marked for purposes of identification in conformance with the numbers set forth on page 1 of the document.

(Testimony of C. F. McErlean.)

Examiner Wrenn: They will be marked U-1 through U-15

(The documents referred to were marked U-1 through U-15 for identification.)

Q. (By Mr. Reilly): Are your qualifications correctly set forth on U-1? A. They are.

Q. Will you amplify, but briefly, your present duties with United Air Lines?

A. Since January 1, 1946, I have been Director of [2535] United's Law Department. In the direction of that department I was responsible for the handling of all of United's legal business, including a substantial responsibility in connection with the company's labor relations. During this entire period and since the summer of 1945, I have been one of the designated negotiators of United Air Lines in connection with all its labor negotiations and I have participated in substantially all their negotiations all that time, either being a spokesman or adviser. If there are more than one, maybe I was adviser to the man who was actually handling it. That is part of the Law Department which I personally handle. I supervise the other legal work.

Q. Are you authorized to state the position of United Air Lines, Inc., in this proceeding?

A. I am.

Q. Will you please state it?

A. United Air Lines states the position that it is going to stand on the agreement it executed for the purchase of this route and which it submitted

(Testimony of C. F. McErlean.)

to the Board for approval in this case. It could not agree at any time in executing the agreement to take any pilots or other employees of Western Air Lines into its employ as part of the transaction.

Before the Board approved the transfer of Route 68, the company made this position clear, and it has not been, and it is not now, agreeable to associating any of Western's employees to its payroll. The company's position still remains the same as it was in 1947. It will not agree to take on Western employees.

Likewise, the company is unwilling to pay any more [2536] money in connection with this acquisitioner to make available any of its funds to pay the cost of any conditions for the benefit of employees that might be set up or ordered pursuant to any formula that might be established if anybody feels that such a formula is necessary. United in its opinion has already paid sufficiently for this route and the properties which it acquired for the purpose, and never has, and does not now, agree to pay any more for the purchase of Route 68.

Q. Do you have any other statement you wish to make, Mr. McErlean?

A. I do not believe so.

Mr. Reilly: You may cross-examine.

Examiner Wrenn: Mr. Bennett, you may examine the witness.

Mr. Bennett: No questions.

Examiner Wrenn: Mr. Crawford, you may cross-examine.

(Testimony of C. F. McErlean.)

Mr. Crawford: No questions.

Examiner Wrenn: Mr. Renda.

Mr. Renda: No questions.

Examiner Wrenn: Mr. Kennedy, you may examine the witness.

Cross-Examination

By Mr. Kennedy:

Q. Is United's management of the opinion now, if you know, that the acquisition of Route 68 was beneficial to United?

A. What do you mean by beneficial?

Q. In terms of its financial effect on the company's operation?

A. I did not inquire of the other members of management [2537] as to whether they had an opinion that I could be authorized to express.

Q. You do not know whether they have an opinion or not? A. That is right.

Q. Or if they have an opinion, what it is?

A. That is right.

Q. Mr. McErlean, let us suppose that United and Western pilots can work out an agreement providing for the transfer of certain Western pilots to United, and it is acceptable to the United pilots. How would United be adversely affected if it took on those Western pilots?

A. United Air Lines, in our opinion, would be adversely affected for several reasons. Number one, we never agreed to take any pilots. We

(Testimony of C. F. McErlean.)

are a party to the agreement the ALPA is working out. We have been invited to participate. We have a substantial number of our own pilots on furlough, and United Air Lines primarily desires to retain the management function of selecting its own employees. United Air Lines must take the responsibility for the safety of its operation and therefore we feel we must have full authority to make our own selection of employees, and more particularly, pilot employees.

Q. Would you not suggest that the Western pilots who might be transferred to United would not qualify?

A. I cannot suggest one way or another. But United Air Lines wants an unhampered right to select its own employees. It will not agree merely to take employees that someone else agrees ought to be put on their payroll. We are responsible for the safety operation of our company. [2538]

Q. Suppose the Burlington Formula were imposed. Why would it be inequitable to require United to bear half of the liability?

A. United Air Lines did not agree to bear any more cost. United Air Lines, it seems to us, has paid a substantial sum of money for this route, in the neighborhood of $3,750,000. The normal practice, as I understand it, as in the Burlington Formula, the employees must find a way to make those payments out of any assets it gets. If I might say, I do not want to leave any impression by my answer that United agrees or thinks that

(Testimony of C. F. McErlean.)

a formula is necessary, or if one is found to be necessary that the Burlington Formula is the proper formula for this industry.

Q. I think we understand that. If United were acquiring all of Western, would you consider it equitable that they make such arrangement for taking over Western employees?

A. If we acquired the total airline our position would be different.

Q. Yes?

A. In that case we would wish to negotiate what that was before we signed any contract.

Q. Assuming it would be equitable to make some provision for the Western employees, why is the situation different when you take over only part of it?

A. Western Air Lines retained a substantial amount of routes to be operated. It was granted additional routes which were pending at the time which would absorb additional of its employees. United Air Lines was somewhat overstaffed itself and it had more employees than it actually [2539] needed and they could use them on this operation. We did not agree that we would do that. That was made clear to the Board before the Board approved the transaction.

Q. Suppose it were clear that some Western employees had lost their job as a result of the acquisition of Route 68, would your last answer be any different?

(Testimony of C. F. McErlean.)

A. If some employees of Western had lost their job because of this transaction?

Q. Yes.

A. My answer would be no different so far as United's responsibility is concerned.

Examiner Wrenn: Any redirect?

Mr. Reilly: No.

I offer U-1 through U-15 inclusive.

Examiner Wrenn: Is there any objection?

(No response.)

Examiner Wrenn: They will be received.

(The documents heretofore marked U-1 through U-15 for identification received in evidence.)

Examiner Wrenn: Counsel No. 57, United Air Line pilots.

Mr. Bennett: On behalf of Counsel 57 I move that their petition to intervene be withdrawn.

Examiner Wrenn: Your motion stands on the record for action by the Board. You are asking that the intervention be dismissed?

Mr. Bennett: That is right.

Examiner Wrenn: Does Public Counsel have any witnesses?

Mr. Kennedy: No.

Examiner Wrenn: This concludes the presentation of the [2540] evidence.

Mr. Kennedy: Public Counsel has circulated a stipulation which has been signed by each of the counsel appearing at this hearing. It is signed in

counterpart originals, and I would like to offer the counterpart originals which are five for the record. I will offer a duplicate for the second docket.

Mr. Reilly: I move that the intervention of UAW-CIO be dismissed.

Examiner Wrenn: You raised a question in my mind there, Mr. Reilly, as to whether it is an intervention. As I recall the Board's order, reopening this, it made them a party to it by express order of the Board rather than by a petition by UAW-CIO to get in here.

Mr. Reilly: I move that they be eliminated as a party to this proceeding.

Examiner Wrenn: That motion will be presented to the Board for action.

Are there any other matters that ought to be discussed at this time?

Mr. Bennett: I believe, Mr. Wrenn, we had a discussion at one time regarding what, if anything, should be done as to the decision that may come out of the arbitration between Western and United pilots. I indicated at that time that it would be our wish, and I felt it would be helpful not only to yourself and the Board, but to United and Western if that arbitration decision were a part of this record. It is my suggestion that the record be kept open at least to receive that arbitration decision. I so move. I was informed, however, [2541] that in all probability if that were done, United and Western would wish an opportunity to be heard upon it. If that is the case, I

would have no objection to that. I do think that that arbitration decision, if, as and when it is rendered, would be helpful to all of the parties to this case, and I suggest that the record be held open for its receipt.

Examiner Wrenn: I want to ask a question here, Mr. Bennett. Is there an iron clad agreement between the pilots of Western and the pilots of United settling certain of these points and agreeing on this arbitration procedure, or is that just a matter that is being talked about?

Mr. Bennett: There is an agreement signed by both groups of pilots which provides for the arbitration. Under that agreement, application has already been made to the National Mediation Board for the appointment of a neutral to sit with two pilots from each group and the arbitration is, by the agreement, designed to begin on the 26th day of this month. I think also by the terms of the agreement, the decision must be rendered by the Arbitration Board so selected by the 13th of December. The arbitration decision will definitely be through by that time under the terms of the agreement itself.

Examiner Wrenn: So there is actually something set up, so the procedure has been started. It is not a thing that can be walked away from and left?

Mr. Bennett: No.

Examiner Wrenn: Does that agreement bind all parties here, that as far as they are concerned they have to accept the decision of the arbitration

panel. Is it something they can walk away [2542] from?

Mr. Bennett: The agreement says the decision shall be binding or final on the parties.

Examiner Wrenn: If a decision is handed down, it will be shown that is what the pilots are bound to accept?

Mr. Bennett: That is correct.

Examiner Wrenn: That is not binding on the management of Western or United or the Board. It is strictly the pilots?

Mr. Kennedy: Yes.

Mr. Bennett: Yes.

Mr. Renda: Western took the position yesterday that it would oppose any motion made on behalf of the ALPA to hold the record open until such time as you could receive into evidence the arbitration award. Our position today is no different. Without having to restate the reasons I gave yesterday, I feel in our opinion that the move, whether right or wrong, would tend to preempt the Board's decision in this case. The Board has before it the principal issue; whether any employees were adversely affected. I am inclined to think that is as a result of this arbitration procedure which the ALPA has sponsored, and which the Western and United pilots are going through, that there be a finding that certain pilots were adversely affected and that is where my fear attaches. I am not concerned with their finding as to what comes after. It is the first issue which must be settled. Were any pilots or employees adversely

affected? If that question is answered No, then there is no need for determination as to whether to compensate, remunerative or return to status quo. I am fearful if that is received into evidence and made a part of the record in this case, it will, without any doubt [2543] in my mind, prejudice the right of Western, not only with respect to pilots, but particularly more so with personnel represented by the BRC.

Mr. Bennett: May I make one statement in response to that?

Examiner Wrenn: Yes.

Mr. Bennett: I think that the objection that Mr. Renda makes would be certainly more appropriately made at the time the arbitration decision is before us. If the decision made no reference to adverse effect, but let us say, stated if the Board in its wisdom decided that pilots should follow the route, that no more than the recommendation would be accepted. Ours is in the nature of a recommendation. It is not designed to influence the Board in its decision on who was affected. I am being perfectly honest as I understand the matter. This is not designed to influence the Board. It is designed, if you please, to bring the Western and United pilots into agreement as to who, how many and how they should be integrated if and provided the Board does find that they are adversely affected and, further, that they should follow the route.

Examiner Wrenn: Is one of the questions to be submitted to the panel the question of whether

or not the pilots of Western on Route 68 were adversely affected?

Mr. Bennett: I am not certain that that question is specifically asked. I am not certain about that.

Examiner Wrenn: This is not an official body or Governmental Agency or anything that is making a determination on that so that it can be urged that we should take judicial notice? [2544]

Mr. Bennett: No. This is an arbitration of two groups of individual private citizens.

Examiner Wrenn: Two pilots and two pilots from Western and a fifth man on the personnel side.

Mr. Bennett: Yes.

Mr. Reilly: Then there would not be any purpose in submitting the decision unless they felt it was going to be beneficial to them. We are dealing with humans who follow natural impulses. United Air Lines will object to the receipt in evidence of any decision of any arbitration board. The persons who will be affected by the decision are not parties to that agreement. The Civil Aeronautics Board cannot issue an order unless it is based on findings. There will be nothing, as I understand it from the attitude of Mr. Bennett, except the bare recommendation of the arbitration board.

Even if the copy of the contract and the questions submitted were made a part of this record, United would still want the opportunity to examine on what were the issues and what were the

attitudes and the basis upon which the findings were made. There would not be an arbitration board unless there has been at least one of the parties adversely affected. There is no question that that is their position.

Mr. Bennett said for the first time today, "if" any parties were adversely affected. He read from a partly prepared statement. If the Board should accept and endeavor to use the decision of the arbitration board in its order in this proceeding, United Air Lines is taking the position that they will not absorb or accept Western employees.

I want to put Mr. Bennett on notice we will object [2545] to this decision being put in the record. We object to the record being held open for any more time than the fifteen days allowed for Mr. Renda to put additional information in the record and the time for Mr. Bennett to rebutt the exhibits submitted by Western.

Mr. Bennett: May I make a statement?

Originally it had not been our intention to submit the arbitration decision or the agreement or any part of that machinery. I think at the very most, whether it was in the nature of the arbitration decision itself or the agreement, the most that might be said for what we submitted was that it was our recommendation. That is what I desire most because if we settle these differences between United and Western we would be in a position at that time to make a recommendation only as to number, identity and how it should be accomplished by way of integration. The Air Lines

Pilots Association, Western and United pilots, this Board, Public Counsel, United and Western might rely upon, if in the Board's wisdom they decided to integrate the seniority list, could be done without creating any furor. That was our original thought upon the subject, and it has not changed. The most we could possibly do is make a recommendation to the C.A.B. through yourself and by so doing indicate to Western and United, if the Board makes a decision along those lines, that there would not be created a furor.

Mr. Kennedy: I was going to say I think Mr. Bennett is right. He is saying what he will submit is a recommendation of the pilots, or statement of position of the pilots, which will have no evidenciary value showing anybody is adversely said. In view of what he says, it seems to me the objection [2546] which counsel for Western and United make is groundless.

Mr. Reilly: Is it your opinion that in a proceeding such as this that the Board and parties should be free to submit Ex Parte and extra judicial statements to the Board?

Mr. Kennedy: They should be free to state what their position is. I do not think they should be free to submit Ex Parte evidence restatements, but it is not offered for that purpose.

Mr. Reilly: I think the record speaks for itself.

Mr. Renda: It is not being offered for that purpose so why clutter the record with it? It

would not be of any help. It would not be considered as part of the record.

Mr. Bennett: I think it would be helpful.

Mr. Reilly: You and Mr. Kennedy better get together.

Mr. Renda: It is being offered.

Examiner Wrenn: It is perfectly clear that there is not going to be any agreement that the record be held open to receive that. Conceivably, if your decision is submitted, it might be such that the parties would not want to ask any question about it. They are not going to agree to it in advance. They do not want to do that. I am going to grant your motion to this extent: I will hold open this record until the 15th of December to permit you to offer it. If it is not submitted by then the record closes automatically. If by that time you offer it and the parties indicate they have no objection, I will receive it and close the record.

On the other hand, if the parties do have objection to it, it may be necessary to hold a further hearing on it. However, we are not agreeing that that can be offered and [2547] received in evidence.

Mr. Renda: Your last statement covered one point I had in mind. Even though it were to come in, it will not be received in evidence and not be a part of the record. Notwithstanding that fact, in order to safeguard Western's rights, I want to make a motion on the record now that unless the Examiner is advised to the contrary, if that is presented before the 15th of December, it

shall be Western's position that we object to the receipt of it.

Mr. Reilly: That is United's position.

Examiner Wrenn: I want the record to be clear that I have that in mind.

Mr. Reilly: We want the right to cross-examine with respect to the exhibit.

Examiner Wrenn: I understand that, and it is so understood unless Western and United after seeing the document agree to its going in, then I will receive it and close the record. I am merely holding the record open to permit you to offer it. It is not an indication that it will be received in evidence. We may have to have a further hearing on that. It will depend upon the wishes of the party.

This question of further procedural steps is somewhat complicated by the last situation here. It would have to be clarified in the light of what happens when the record is finally closed around December 15, but I take it you gentlemen want to submit briefs?

I might say, as far as I am concerned, this record was certified to the Board and it is certified. So far as I know, that is the procedure. The record is certified to the Board and it will go to them. I do not know when they will [2548] hand down a decision.

Mr. Renda: We are willing to waive submission of briefs to the Board, but we want to reserve the right to argue to the Board.

Mr. Reilly: I wish to suit the convenience of the ALPA.

Examiner Wrenn: Off the record.

(Discussion off the record.)

Examiner Wrenn: On the record. For the benefit of the record, I will say it would be my own opinion that the same procedure that was followed in 1947 would be followed here, and that is, that final decision would be handed down without a tentative decision.

Assuming that is the case, Western wants oral argument before the Board.

Mr. Renda: If the Examiner feels it would be helpful to submit brief, we have no objection but we are not proposing it ourselves.

Examiner Wrenn: How do you feel about it?

Mr. Crawford: If we are going to have oral argument, I think it would be helpful to the Board to have briefs. I will abide by the decision of the others.

Mr. Bennett: I would prefer to waive briefs and argue orally.

Mr. Kennedy: It is up to counsel because they are the ones that have the interest, but I would express the opinion it would be more desirable to have briefs, and it would also be more helpful. If counsel does not feel that way, and apparently they do not, they may do what they like.

Examiner Wrenn: I am just trying to get your thinking. [2549] We cannot make a final determination as to what happens on December 15 as

to whether the record is closed or whether it might be necessary to do something further about this document. At that time I will indicate the final procedure.

If there is nothing more, we will close the hearing. Thank you.

(Whereupon, at 11:50 o'clock a.m., the hearing in the above-entitled matter was closed.)

Received November 25, 1949. [2550]

Before the Civil Aeronautics Board

AIR LINE PILOTS EXHIBIT No. 1

In the Matter of:

WESTERN AIR LINES, and UNITED AIR LINES, INC.

Reopened Route 68 Case

Docket No. 2839

Air Line Pilots Association, International

Statement of A. W. Stephenson
Western Air Lines, Inc., Pilot Employee

A. W. Stephenson, a pilot employee of Western Air Lines, Inc., continuously since May 5, 1928, makes the following statement:

That the monthly pay of DC-4 and DC-3 captain air line pilots with Western Air Lines, Inc., in September, 1947, was as follows:

DC-4 Captains $1,035.00
DC-3 Captains 815.00;

and that the monthly pay of DC-4 and DC-3 co-pilots with Western Air Lines, Inc., in September, 1947, was as follows:

DC-4 Co-pilots$420.00
DC-3 Co-pilots 350.00;

That the allotment of flying time to all pilots of Western Air Lines, Inc., in September, 1947, and prior and since that date, was and still remains strictly in accordance with pilot seniority. That is to say, the more senior pilots on Western's system are entitled to and are assigned the flying time available on the best routes and the best-paying equipment, and so on down the seniority list until a curtailment requires the last junior pilot to be without any flying time and he may be thus furloughed;

That on or about the 11th day of March, 1946, he bid and was awarded a permanent captain DC-4 run on Western's Route 68; that he qualified on said route and flew the same until about September, 1947, when Western sold said Route 68 to United Air Lines, Inc.;

That as a result of the sale of Route 68, as aforesaid, he was required to and did qualify on Route 63 (Los Angeles - San Francisco), and that in so doing he lost approximately 21 hours of gainful flying time with a consequent pay loss of $175.00;

That A. W. Stephenson knows of his own knowledge that, by reason of the sale of Route 68 of Western Air Lines, Inc., to United Air Lines, Inc., in September of 1947, and by reason of subsequent movement of the more senior pilots in Western's

system to lesser positions on Western's system, the Company discharged some twenty-odd of Western's most junior pilots, and all of the remaining pilots on Western's system were adversely affected and thereby suffered a continuing loss of seniority rights and a continuing impairment of their employment rights of every kind and character. This adverse effect upon the air line pilots of Western Air Lines, Inc., took varying forms. Some pilots were required to move from Route 68 and check out on other routes with a consequent loss of pay. Many pilots were required to take a reduction in status from captain to reserve pilots or co-pilot, or from reserve pilot to co-pilot, with the consequent loss of earnings; [2554]

That he, A. W. Stephenson, has in his possession affidavits from 21 pilot employees of Western Air Lines, Inc., which indicate that each such pilot employee was adversely affected in his working conditions with Western Air Lines, Inc., immediately subsequent to and as a result of the sale of the Los Angeles-Denver Route 68, and thereby suffered a continuing loss and damage of every kind and character to his seniority rights as well as his employment rights;

That this loss of employment status by the pilot employees of Western Air Lines, Inc., is a continuing loss and damage that will never be rectified unless and until the purchasing Company (United) is required to accept into its employ the number of pilots who were flying Route 68 at the time this

route was operating normally as a part of Western's system;

That he, A. W. Stephenson, discussed with each of the 21 pilot employees named in this statement the adverse effect which the sale of Route 68 had made upon their working conditions and that, in many instances, he has personal knowledge that the facts hereinafter set forth are true; that the names of these 21 air line pilot employees and the context of their affidavits above mentioned are as follows:

1. Richard M. Kennedy, 1215 South Pine, San Gabriel, California, was employed by Western Air Lines, Inc., continually, with the exception of furlough periods, as a pilot since July 1, 1946. That prior to September, 1947, he was flying Route 68 steadily as a co-pilot. That subsequent to the sale of Route 68 and in September, 1947, he was furloughed and remained in this status until May, 1948; that he was called back to work in May, 1948, and again furloughed in September, 1948; that his loss of pay during the period above mentioned was approximately $3,160.00.

2. L. E. Warden, 6503 West 96th Place, Los Angeles, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since September 6, 1944; that during 1946 and until September, 1947, the date of the sale of Route 68, his position on Western's seniority list allowed him to fly some captain time and during that period he was never more than 10 seniority numbers away from flying as a captain. That after the sale of Route 68 by reason of the movement of more senior

pilots from Route 68 to other routes on Western's system, he has not been able to fly any captain time since September, 1947, and is presently 20 seniority numbers away from flying as captain.

3. E. W. Chapman, 3200 Elm Avenue, Manhattan Beach, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about August 15, 1942. That prior to the sale of Route 68, he was flying as captain on DC-3 equipment on Western's Route 13 continuously since October, 1946. That after the sale of Route 68 he was demoted to flying co-pilot on DC-3 equipment on Route 13, with a consequent loss of [2555] pay amounting to approximately $322.50 per month; that this loss has continued from September, 1947.

4. Walter Hail, 415-C Venice Way, Englewood, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about September 1, 1942. That prior to the sale of Route 68 he was flying steadily as captain of DC-3 equipment on Western's Route 13 for a period of approximately 5 months. That after the sale of Route 68 and in November, 1947, he was demoted to co-pilot on DC-3 equipment flying Route 13, with a consequent loss of pay amounting to approximately $270.00 per month, and that such demotion lasted from November, 1947, to May, 1948.

5. Frank Cole, 5122 West 123rd Street, Hawthorne, California, has been continuously in the employ of Western Air Lines, Inc., since on or about March 24, 1943. That prior to the sale of Route 68 he was flying as captain on DC-3 equip-

ment on Western's Route 13 for a period of approximately 8 months. That after the sale of Route 68 he was demoted to flying as co-pilot on DC-3 equipment for approximately 9 months with a consequent loss of pay of approximately $2,800.00 annually.

6. Walter Peters, 2504 West 81st Street, Englewood, California, has been continuously in the employ of Western Air Lines, Inc., since on or about September 12, 1943. That prior to the sale of Route 68 he was flying as captain on DC-3 equipment on Route 13, with average earnings of approximately $650.00 per month. That after the sale of Route 68 he was demoted to co-pilot on DC-3 equipment flying Route 13, with an average monthly earning of approximately $440.00.

7. John Barchard, 1105 North Beverly Glen, Los Angeles, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about June 8, 1941. That in September, 1946, he bid and was awarded a permanent captaincy on DC-4 equipment on Western's Route 63; that he qualified and flew the same until about September, 1947. That after the sale of Route 68 he lost his bid run aforesaid and was demoted to reserve captain flying DC-3 equipment on Route 63 and other Western routes, with a consequent loss in pay of approximately $170.00 per month. That this loss of pay continued for a period of 14 months or a total of approximately $2,380.00.

8. Berle M. Holt, 6250 Klump Avenue, North Hollywood, California, has been continuously in the

employ of Western Air Lines, Inc., as a pilot since on or about August 31, 1942. That prior to the sale of Route 68 he was flying as captain on DC-4 equipment on Western's Route 63 steadily since about April, 1947. That after the sale of Route 68 and on or about September 22, 1947, he lost his captain run on DC-4 equipment and was [2556] demoted to flying captain on DC-3 equipment on Routes 13 and 63, with a consequent loss of pay amounting to approximately $165.00 per month. That this loss of pay continued for a period of approximately 11 months, or a total of $1,815.00. That in February, 1948, he was demoted to co-pilot and so remained for a period of three months, with a resultant loss in pay in the approximate amount of $900.00.

9. J. E. Sheasby, 14658 Gilmore Street, Van Nuys, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about January 19, 1940. That in June, 1946, he bid and was awarded a permanent run as captain on DC-4 equipment on Route 63; that he was qualified and flew on said route until about September, 1947. That in September, 1947, after the sale of Route 68, he lost his bid run as a captain on DC-4 equipment and was demoted to captain flying DC-3 equipment, with consequent loss in pay amounting to $174.00 per month.

10. J. T. Keller, 6476 West 81st Street, Los Angeles, California, has been continuously in the employ of Western Air Lines, Inc., since on or about March 15, 1941. That in June, 1946, he bid and was awarded a permanent captain DC-4 run

on Route 68; that he qualified and flew said route until about January or February, 1947. That between January and September, 1947, he was required to fly as captain on DC-4 and DC-3 equipment on Route 63 and Route 13, with a resultant loss of pay in the approximate sum of $1,080.00. That after the sale of Route 68 and in September, 1947, he was demoted permanently to flying captain on DC-3 equipment on Route 13, where he still remained until November, 1948, with a consequent loss of pay over the 15-month period intervening of approximately $2,550.00. That in 1946 his position on Western's seniority list permitted him to hold a permanent captain bid on DC-4 equipment on Route 68; that in November, 1948, his position on Western's seniority list was three numbers below the last pilot flying DC-4 equipment; and this notwithstanding that since September, 1947, he has moved up 5 numbers on said list.

11. Dick Young, 9717 Laraway Avenue, Englewood, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about March 20, 1942. That in September, 1946, he bid and was awarded a permanent run as captain on DC-4 equipment on Route 68; that he qualified and flew said route until about February, 1947, when Western withdrew two DC-4 schedules from Route 68. That he then was required to fly as captain on DC-4 and DC-3 equipment on Western's Routes 63 and 13, with a consequent loss of pay of approximately $765.00. That after the sale of Route 68 he was demoted to co-pilot flying DC-3

equipment, with consequent loss of pay of approximately $170.00 per month, which continued for a period including November, 1948, or a total of approximately [2557] $2,380.00. That his position on Western's seniority list in 1946 entitles him to hold a permanent captaincy run on DC-4 equipment; that after the sale of Route 68 in September, 1947, he has remained a co-pilot, notwithstanding that he has moved up 7 numbers on the seniority list, and on last-mentioned date remains 3 seniority numbers from permanent captain's position on the seniority list.

12. Claude L. Gray, 11051 Lomay Street, North Hollywood, California, has been continuously in the employ of Western Air Lines, Inc., since on or about November 18, 1944, as a pilot. That in 1946 and until September, 1947, his position on the Western seniority list allowed him to fly some captain time; and that during said period he was never more than 15 seniority numbers away from flying as permanent captain. That after the sale of Route 68 in September, 1947, he was 35 seniority numbers away from flying as captain and has been unable to fly any captain time since September, 1947.

13. Robert S. Conover, 5731 Woodman Avenue, Van Nuys, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about April 21, 1941. That in September, 1946, he bid and was awarded a permanent captaincy on DC-4 equipment on Route 68; and that he qualified and flew said route until September, 1947. That after the sale of Route 68 he was de-

moted to captain flying DC-3 equipment on Routes 63 and 13, with a consequent loss in pay of approximately $170.00 per month; that this demotion has continued through November, 1948.

14. H. H. Bailey, 2141 Screenland Drive, Burbank, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about July 15, 1941. That in September, 1946, he bid and was awarded a permanent captaincy on Western's Route 68; that he qualified and flew said route until September, 1946. That between December, 1946, and August, 1947, he flew as captain on DC-4 and DC-3 equipment on Route 63, with intermittent flights on Route 13 as DC-3 captain. That after the sale of Route 68 and about September, 1947, he was demoted to co-pilot flying DC-3 equipment exclusively, with a consequent loss of pay of approximately $85.00 per month.

15. Herbert H. Jordan, 1408 5th Street, Apt. D, Glendale, California, has been continually in the employ of Western Air Lines, Inc., as a pilot since on or about July 13, 1946, except during periods of furlough. That prior to September, 1947, he was flying co-pilot on Route 13 and had been so flying for a period of 6 months. That after the sale of Route 68 in September, 1947, he was furloughed and remained out of the employment of Western Air Lines, Inc., until on or about June, 1948. That in September, 1947, he was 17 seniority numbers above the most junior working pilot, and in November, 1948, he was the last working [2558]

pilot on the seniority list and was again furloughed on November 20, 1948.

16. T. G. Keeley, 5333 Marburn Avenue, Los Angeles, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about January 28, 1941. That in June, 1946, he bid and was awarded a permanent captaincy on DC-4 equipment on Route 68 and that he qualified and flew said route. That after the sale of Route 68 and on or about September, 1947, he lost his permanent DC-4 captain status and was demoted to reserve pilot flying DC-3 equipment on Route 63 and other Western routes, with consequent loss of pay for a period of 14 months of $170.00 per month, or a total of $2,380.00.

17. Westcot B. Stone, 1611 South Street, Andrews Place, Los Angeles, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about July 1, 1946, except when furloughed. That prior to the sale of Route 68 in September, 1947, he was and had been flying Route 68 steadily as co-pilot. That after the sale of Route 68 he was furloughed and remained out of employment from September, 1947, to May, 1948; that he was called back to work in May, 1948, and again furloughed in September, 1948.

18. Edward Schuster, 952 Eleventh Street, Manhattan Beach, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about May 8, 1941. That in 1946 he bid and was awarded permanent captaincy on DC-4

equipment on Western's Route 68 and qualified and flew said route until about September, 1947. That after the sale of Route 68 and in September, 1947, he lost his permanent captain status and was required to fly as captain on DC-3 equipment on Route 13, with a resultant loss in pay of $170.00 per month. That whereas, in 1946 he was approximately 31 seniority numbers ahead of the first co-pilot on the seniority list, in November, 1948, he had been demoted to reserve captain flying DC-3 equipment and was only 6 seniority numbers ahead of the first co-pilot on the seniority list.

19. George M. Ryan, 820½ No. Martel Avenue, Hollywood, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about February 25, 1939. That in July, 1946, he bid and was awarded permanent captaincy on DC-4 equipment on Route 63; that he qualified and flew said route until September, 1947. That after the sale of Route 68 and in about September, 1947, he was demoted to reserve captain flying DC-4 and DC-3 equipment, with a consequent loss of pay, over a period of 13 months, of approximately $170.00 per month. That in 1946 he was No. 11 on the seniority list of DC-4 permanent captains on Route 63; whereas, in November, 1948, he was approximately 3 seniority numbers below last permanent DC-4 captain on said list. [2559]

20. Fred W. Wahl, 8831 South Wilton Place, Los Angeles, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot

since on or about May 27, 1939. That in July, 1946, he bid and was awarded a permanent captaincy on Route 68 DC-4 equipment; he qualified and flew said Route until September, 1947. That after the sale of Route 68 and in September, 1947, he lost his permanent captain bid and was demoted to fiying captain on DC-3 equipment on Route 13 with consequent loss of pay amounting to approximately $85.00 per month. That this loss continued for approximately 10 months or a total of $850.00.

21. Floyd L. Aker, 10033 So. Manhattan Place, Los Angeles, California, has been continuously in the employ of Western Air Lines, Inc., as a pilot since on or about May 15, 1938. That in May, 1946, he bid and was awarded permanent captaincy of DC-4 equipment on Route 68; that he qualified and flew said Route until September, 1947. That after the sale of Route 68 and in September, 1947, he was demoted to captaincy fiying DC-3 equipment on Route 63 with a consequent loss of pay amounting to approximately $140.00 per month. That subsequently he was demoted to flying as reserve pilot on DC-4 equipment without a regular run from October to November, 1948, with a consequent loss in pay of approximately $400.00.

Summary of This Exhibit No. 1

For the convenience of the Board, following is a summary of Exhibit No. 1:

Right at the outset, it must be pointed out by the Association that this Exhibit deals with only a

minor part of the problem created for the pilots of Western Air Lines, Inc., by the purchase of the Company's Route 68 by United Air Lines, Inc. The principal highlight of this case affects vitally substantially all pilot employees of Western Air Lines, Inc., for the reason that all such employees were adversely affected by the sale of Route 68 and any monetary loss sustained by the Western Air Lines, Inc., pilot employees constitutes only in a small measure the actual and material loss suffered by the pilots of this Company. Their real loss is a monetary one and a lessening of the value of their seniority rights, related directly to promotion and assignment rights, accumulated through the years in a manner that constitutes a continuing damage, which will carry on, increasing and multiplying during the lifetime of this company in ever-increasing proportions.

Accordingly, the foregoing makes it self-evident, and is conclusive proof that herein lies a situation that can only be rectified and remedied by requiring the acquiring Company, United Air Lines, Inc. (the purchaser of Route 68), to take over the number of Western Air Lines, Inc., pilots required to [2560] operate Route 68 when this Route was operating as a normal part of the Western Air Lines, Inc., operation. It is common knowledge that this Route, when operating as a part of such operation, was one of the best-paying pilot runs in the Western part of the United States.

Western Pilot Employees Adversely Affected—as shown by Exhibit No. 1	Approximate Date of Pilots Being Adversely Affected	Approximate Monetary Loss to Pilot Adversely Affected
Richard M. Kennedy	September, 1947	$3,160.00
L. E. Warden	September, 1947	Not Estimated
E. W. Chapman	September, 1947	
Walter Hail	November, 1947	$1,890.00
Frank Cole	September, 1947	$2,100.00
Walter Peters	September, 1947	
John Barchard	September, 1947	$2,380.00
Berle M. Holt	September, 1947	$2,715.00
J. E. Sheasby	September, 1947	
J. T. Keller	January, 1947	$3,630.00
Dick Young	February, 1947	$3,145.00
Claude L. Gray	September, 1947	Not Estimated
Robert S. Conover	September, 1947	
H. H. Bailey	September, 1947	
Herbert H. Jordan	September, 1947	Not Estimated
T. G. Keeley	September, 1947	$2,380.00
Westcot B. Stone	September, 1947	Not Estimated
Edward Schuster	September, 1947	
George M. Ryan	September, 1947	
Fred W. Wahl	September, 1947	$ 850.00
Floyd L. Aker	September, 1947	$2,480.00

/s/ A. W. STEPHENSON.

Received November 16, 1949. [2561]

Before the Civil Aeronautics Board

AIR LINE PILOTS EXHIBITS Nos. 2 THROUGH 16

In the Matter of:

WESTERN AIR LINES, INC., and UNITED AIR LINES, INC.

Re-opened Route 68 Case

Docket No. 2839

Air Line Pilots Association, International

Explanation of the Statistical Exhibits

These exhibits address themselves most specifically to the first of the Public Counsel's Statement of Issues in the re-opened proceedings under Docket No. 2839, Western-United Route 68 Sale Agreement, namely, "whether any employees of Western Air Lines, Inc., have been adversely affected as a consequence of the transfer of Route 68, and certain physical properties by Western Air Lines, Inc., to United Air Lines, Inc."

The following statistical exhibits provide the quantitative proof that the transfer of Route 68 adversely affected the Western Air Line pilots. They demonstrate that as a direct consequence of the transfer, the pilots' employment opportunities were seriously limited and their earnings were reduced. They demonstrate further that Western Air Line pilots suffered far more than their colleagues on other air lines. Finally, they demonstrate that had the CAB required compliance with the well established precedent of transferring the pilots

with the routes, the adverse effect would have been completely avoided. The evidence shows that there was adequate room for the absorption by United Air Lines of all the pilots who had flown Route 68 and that there still is room for their absorption.

The statistical exhibits, therefore, will provide the factual basis for the necessary remedial action, namely, a CAB order at this time withdrawing its approval of the sale of Route 68 until such time as the Western Air Line pilots are transferred to United Air Lines with all their seniority and other benefits preserved.

In reviewing the attached statistical exhibits, it is most important to keep in mind the following highly pertinent facts about the history of the operation of Route 68. Western Air Lines began actual operation of Route 68 between Denver and Los Angeles in May, 1946, with far less than the full complement of equipment and personnel required to operate this route efficiently and successfully. As additional equipment was acquired by the air carrier it was put into service later in 1946 and during this year the company appeared to be experimenting to determine how much service the traffic over this route would support. It was not until early in 1947 that a normal operation of Route 68 was achieved, at which time there was assigned to the route no less than four DC-4 aircraft with a complement of 28 air line pilots. This normal operation of Route 68 was cut short by the company in August of 1947, when it voluntarily reduced the schedule by disposing of some of the aircraft or

transferring them to other uses. The most significant of such transfers of equipment and personnel from Route 68 occurred when the company began operating the San Francisco-Seattle Route 63 during August of 1947. Thus, the period of most normal operation, which will be used in later comparisons, is the period February to July, 1947.

United Air Lines began its operation of Route 68 late in September, 1947. This company too, went through a breaking-in and shake-down period on Route 68, during which time it also appeared to be experimenting to determine how much service the traffic over this route would support. By April of 1948, it appears to have established on the route what was very similar to its final pattern. By June, 1948, United Air Lines had established the service pattern which it still operates on Route 68. [2563]

Explanation of Exhibit No. 2

The pilot's job in essence is that of operating a given airplane a certain number of miles or a certain number of hours. One measure of the employment opportunities on a particular air line is the number of aircraft miles flown. Exhibit No. 2 presents this information. It shows that coincident with the transfer of Route 68 in September of 1947, there was a dramatic drop in the number of aircraft miles flown—from approximately 746,000 miles in August, 1947, to 538,000 miles in October. If the period of most normal operations during which Western Air Lines operated Route 68 is taken (February through July, 1947), Western Air Lines

is seen to have operated 3,900,000 aircraft miles. The same 6-month period the following year, after Route 68 was transferred, shows Western Air Lines operated only 3,300,000 aircraft miles. This is a shrinkage of 15% in aircraft miles between the two comparable periods. Approximately the same results are secured when revenue aircraft miles are analyzed. The principal cause for this shrinkage was the transfer of Route 68. Later exhibits will reinforce this point. When an air line shrinks in size, employment opportunities are lost and the pilots are necessarily affected adversely. [2564]

Explanation of Exhibit No. 3

A second measure of the employment opportunities on this air line is the number of aircraft hours flown. A similar dramatic drop is seen subsequent to September, 1947, when Route 68 was transferred. A comparison of the period of most normal operation, February through July, 1947, with February through July, 1948, shows a 13 per cent drop in aircraft hours. Approximately the same results are secured when revenue aircraft hours are analyzed. This second measure produces the same [2566] conclusion.

Explanation of Exhibit No. 4

While in the first instance, it is the number of aircraft miles or aircraft hours which determines the available pilot employment opportunities, in the final analysis it is the number of passengers which are carried over those miles which determines whether the employment opportunities are

likely to persist or whether they are just temporarily supported by the operation of aircraft which do not carry sufficient passengers to be profitable. After the transfer of Route 68, passenger miles are seen to have fallen even more drastically than either aircraft miles or aircraft hours. A comparison of the 6-month period of most normal operation shows a decline from 95,000 passenger miles in the period February through July, 1947, to 57,000 passenger miles in the same 6 months in 1948. This is a shrinkage of 40% in passenger miles. There is little doubt that when an air line drops 40 per cent of its business, its pilots are adversely affected. [2568]

Explanation of Exhibit No. 5

A final measure of pilot employment opportunities is found in the number of available seat miles operated. The same pattern is repeated here after the transfer of Route 68. The decline from 1947 to 1948, as measured by the months February through July, is 23%. [2570]

Explanation of Exhibit No. 6

It is well known that operating a DC-4 is far more remunerative to the pilot than operating DC-3's or for that matter, than operating CV-240's. This exhibit shows that the decline in aircraft miles occurred principally in the operation of the more remunerative DC-4 aircraft. This followed necessarily from the fact that with the transfer of Route 68, 4 DC-4 aircraft were also transferred. While the decline in revenue aircraft miles from

the 6-month period of most normal operation (February through July, 1947), to the same period in the following year was 15 per cent, the decline in revenue aircraft miles flown by DC-4's was 45 per cent. Thus the pilots were not only affected adversely because they lost employment opportunities as a result of the decline in aircraft miles, but, in addition, these fewer aircraft miles were flown on less remunerative aircraft. Put another way, after the transfer of Route 68, there were not only fewer jobs but the jobs that were left did not pay as well. [2572]

Explanation of Exhibit No. 7

Here the measure of aircraft hours is applied by type of aircraft. The conclusion reached on the basis of the preceding exhibit is reinforced. For the comparable 6-month period total revenue aircraft hours fell 13%, but revenue aircraft hours on DC-4's fell 42%. [2574]

Explanation of Exhibit No. 8

As in Exhibit 3, revenue passenger miles fell more drastically after the transfer of Route 68 than either aircraft miles or aircraft hours. Revenue passenger miles fell by about 40% from 1947 to 1948 (as measured by the months of most normal operation, February through July), but revenue passenger miles on DC-4 aircraft fell by a great deal more—by 58%. Not only were the pilots' employment opportunities adversely affected, but their earnings on even these limited employment opportunities were affected even more seriously. [2576]

Explanation of Exhibit No. 9

At the time the CAB was considering the transfer of Route 68, Western Air Lines represented to it that the newly instituted San Francisco-Seattle route would provide equal employment opportunities. This exhibit does not attempt to relate to the question of whether a transfer of pilots from one route to another is either equitable or justifiable. It does demonstrate clearly that the San Francisco-Seattle route is not nearly the equivalent of the Denver-Los Angeles route. For the 6 months, February through July, 1947, a total of 36,000 revenue passenger miles were flown over Route 68, Denver-Los Angeles. Over the same six months in 1948, a total of only 14,000 revenue passenger miles were flown over the San Francisco-Seattle route. The latter route is, therefore, 60% less than the [2578] former.

Explanation of Exhibit No. 10

This exhibit demonstrates that the decline in business on Western Air Lines after the transfer of Route 68 was far in excess of any decline in business done on domestic air lines generally. The first column shows practically no decline in the number of revenue passenger miles operated by all domestic air line carriers. After the transfer of Route 68 in September, 1947, the decline on Western is very obvious. Comparing the 6 months, February through July, 1947, with the same months in 1948, all domestic carriers showed a drop of about 3% while Western Air Lines showed a drop

of 40%. The principal cause on Western was the transfer of Route 68. Thus the result of this transfer was that the pilots on Western Air Lines were affected much more adversely than pilots generally throughout the U. S. [2580]

Explanation of Exhibit No. 11

This exhibit shows that after the transfer of Route 68, the seat miles flown on Western Air Lines dropped substantially—by 23% between February through July, 1947, and the same months in 1948. By dramatic contrast, however, the seat miles flown on all domestic lines did not drop; seat miles flown rose by more than 8% from 1947 to 1948. This occurred because after the transfer of Route 68 Western's pilots were flying fewer and smaller aircraft, while other pilots were generally flying larger, if not more, aircraft. [2582]

Summary

The foregoing statistical exhibits, based almost entirely on official CAB reports, have provided the quantitive evidence that Western Air Line pilots "have been adversely affected as a consequence of the transfer of Route 68."

Exhibits 1, 2, 3 and 4 have proved that the pilots were adversely affected because, as a result of the transfer of Route 68, Western Air Lines shrank considerably—from 15% if measured in aircraft hours to 40% if measured in passenger miles. When an air line shrinks by these proportions, there can be no doubt about the adverse effects on its pilot

personnel. Their employment opportunities vanished.

Exhibits 5, 6 and 7 have proved that the pilots were affected even more adversely as a result of the transfer of Route 68 than previously demonstrated, because they were thereafter required to fly small and less remunerative aircraft. The decline in DC-4 flying was very substantial—from 42% if measured in aircraft hours to 58% if measured in revenue passenger miles. The inescapable result was a reduction in pilot earnings.

Exhibit 8 proved that the CAB was previously misinformed when it was told that the newly instituted San Francisco-Seattle route would be equivalent to the transferred Route 68. It was not even half an equivalent.

Exhibits 9 and 10 have proved that the Western Air Line pilots were affected more adversely than pilots generally throughout the U. S. Pilots generally were flying 3% fewer revenue passenger miles but 8% more seat miles, but primarily as a result of the transfer of Route 68, Western pilots were flying 40% fewer passenger revenue miles and 23% fewer seat miles.

Received November 16, 1949. [2592]

AIR LINE PILOTS EXHIBIT No. 17

Air Line Pilots Association, International

Summary Comparison of Six-Month Period, February Through July 1947, 1948, and 1949

		Feb. thru July, 1947 Number	Feb. thru July, 1948 Number	% change from same 6 months	Feb. thru July, 1949 Number	% change from same 6 months
(1)	Western Air Lines					
(2)	Aircraft miles	3,901,576	3,337,184	—14	3,185,155	—18
(3)	Revenue aircraft miles	3,812,029	3,180,937	—16	3,099,597	—19
(4)	Aircraft hours	22,684:11	19,880:16	—12	16,903:16	—15
(5)	Revenue aircraft hours	22,174:59	19,148:22	—14	16,485:26	—25
(6)	Passenger miles (thous.)	95,322	56,854	—40	56,718	—40
(7)	Revenue passenger miles (thous.)	92,883	54,681	—41	53,856	—42
(8)	Available seat miles (thous.)	142,920	95,993	—32	106,139	—26
(9)	DC-3 rev. aircraft miles	1,518,989	1,872,451	+23	849,499	—44
(10)	DC-4 rev. aircraft miles	2,302,994	1,283,458	—44	386,117	—83
(11)	CV 240 rev. aircraft miles				1,863,981	
(12)	DC-3 rev. aircraft hours	9,660:41	12,231:17	+27	5,469:47	—42
(13)	DC-4 rev. aircraft hours	12,510:24	7,323:41	—41	2,011:48	—83
(14)	CV 240 rev. aircraft hours				9,003:41	+19
(15)	DC-3 rev. pass. miles (thous.)	20,744	24,645	+19	10,013	—52
(16)	DC-4 rev. pass. miles (thous.)	72,118	29,936	—58	8,884	—88
(17)	CV 240 rev. pass. miles (thous.)				34,959	
(18)	Rev. pass. miles by route					
(19)	Los Angeles-Denver (thous.)	36,270				
(20)	San Francisco-Seattle (thous.)		13,907	—61*	12,776	—65*

* Per cent change from revenue passenger miles operated same 6 months in 1947 over the Los Angeles-Denver route.

AIR LINE PILOTS EXHIBIT No. 17—(Continued)

		Feb. thru July, 1947 Number	Feb. thru July, 1948 Number	% change from same 6 months	Feb. thru July, 1949 Number	% change from same 6 months
(21)	Los Angeles-Salt Lake (thous.)	13,788	11,169	—19	11,015	—20
(22)	Salt Lake-Leatherbridge (thous.)	5,730	4,700	—18	4,397	—23
(23)	Other (thous.)	36,817	23,919	—35	23,951	—35
(24)						
(25)	All Domestic Air Mail Carriers					
(26)	Rev. pass. miles (thous.)	3,066,315	2,969,448	—3	3,465,210	+13
(27)	Seat miles flown (thous.)	4,555,868	5,007,302	+10	5,795,935	+27
(28)						
(29)	United Air Lines					
(30)	Revenue aircraft miles					
(31)	On tot. system	29,498,536	29,898,772	+1	27,502,512	—7
(32)	Domestic		29,113,972		26,420,903	
(33)	Revenue aircraft hours					
(34)	On tot. system	176,383:40	174,486:04	—1	144,767:23	—18
(35)	Domestic		170,846:59		141,553:06	
(36)	Revenue pass. miles					
(37)	On tot. system (thous.)	604,562	595,340	—2	685,362	+13
(38)	Domestic (thous.)		572,875		647,667	
(39)	Available seat miles					
(40)	On tot. system (thous.)	777,283	889,782	+15	982,663	+26
(41)	Domestic (thous.)		854,135		926,620	

Received November 16, 1949.

BROTHERHOOD OF RAILWAY CLERKS EXHIBIT A

If the Board finds it in the public interest to grant this application the petitioner requests that the Board invoke the following conditions for the protection of employes who may be affected:

1. If, as a result of the granting of the application and the transfer and amendment of a certificate of public convenience and necessity for Route 68 by which United Air Lines, Inc., purchases certain properties from Western Air Lines, Inc., any employee of either of said air carriers at the time of the said sale is displaced, that is, placed in a worse position with respect to his compensation and rules governing his working conditions, and so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practices and under subsequently negotiated agreements and rules on either or both properties to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation which would have been received by him in the position from which he was displaced. The latter compensation is to be determined by dividing separately by twelve the total compensation received by the employe and the total time for which he was paid during the last twelve

B. R. C. Exhibit A—(Continued)

months during which he performed services immediately preceding the date of this displacement as a result of this transaction (thereby producing average monthly [2793] compensation and average monthly time paid for in the test period). If his compensation in his retained position in any month is less than the aforesaid average compensation in the test period, he shall be paid the difference, less compensation at the rate of the position from which he was displaced for time lost on account of his voluntary absences in his retained or current position, but if in his retained position he works in any month in excess of the average monthly time paid for in the test period, he shall be compensated for the excess time at the rate of pay of the retained position; provided, however, that nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect to any employe; provided, further, that if any employe elects not to exercise his seniority rights he shall not be entitled to compensation. The period during which this protection is to be given, referred to herein as the protective period, shall extend from the date on which the employe was displaced to the expiration of four years from the date of said sale.

Provided, however, that such protection shall not continue for a longer period than the period during which such employe was in the employ of the said air carriers prior to the effective date of said sale.

2. If, as a result of the transactions herein ap-

B. R. C. Exhibit A—(Continued)

proved, any employe of either the Western Air Lines, Inc., or United Air Lines, Inc., is deprived of employment because of the abolition of his position or the loss thereof as the result of this transaction, he shall be accorded a monthly dismissal allowance equal [2794] to 1/12 of the compensation received by him in the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of this transaction. This allowance shall be made during the protective period to each dismissed employe while unemployed.

3. The dismissal allowance of any dismissed employe who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. The said air carrier and the duly authorized representative of their employes shall agree upon a procedure by which the said air carriers shall be currently informed of the wages earned by such employe in employment with other than the Western Air Lines, Inc., or United Air Lines, Inc., and other benefits received.

4. The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employe without good cause to return to service after being notified by either of said air carriers of a position, the duties of which

B. R. C. Exhibit A—(Continued)

he is qualified to perform and for which he is eligible, or in the event of his resignation, death, retirement on pension, or dismissal for good cause.

5. No employe affected by the transaction approved herein shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, [2795] pensions, hospitalization, relief, etc., under the same conditions and so long as such benefits continue to be accorded to other employes of the air carriers involved in the transaction herein approved in active service or on furlough, as the case may be, to extent that such benefits can be so maintained under present authority or corporate action or through future authorization which may be obtained.

6. Any employe retained in the services of either the Western Air Lines, Inc., or United Air Lines, Inc., or who is later restored to service after being entitled to receive a dismissal allowance, and required to change the point of his employment as a result of the transaction, and within the protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss, not to exceed 2 days, the exact extent of the responsibility of both Western Air Lines, Inc., and United Air Lines, Lnc., to be agreed upon in advance by the said air carriers and the employes affected; provided, however, that

B. R. C. Exhibit A—(Continued)

changes in place of residence, subsequent to the initial change caused by the transaction, which result from the exercise by the employee of his seniority rights shall not be considered as within the foregoing provision.

7. In the event that any dispute or controversy arises with respect to the protection herein, which cannot be settled by the carrier and the employe, or his authorized representatives, within thirty days after the controversy arises, it may be referred, by [2796] either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, etc., shall be agreed upon by the carriers and the employe, or his duly authorized representatives.

8(a). The following condition shall apply, to the extent it is applicable in each instance, to any employe who is retained in the service of either Western Air Lines, Inc., or United Air Lines, Inc., (or who is later restored to service after being entitled to receive a dismissal allowance), who is required to change the point of his employment within the protective period as a result of the transaction herein approved and is therefore required to move his place of residence:

(1) If the employe owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value

B. R. C. Exhibit A—(Continued)

of the home in question shall be determined as of a date sufficiently prior to September 1, 1946, to be unaffected by the filing of the applications herein. Either or both of the said air carriers shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employe to any other person.

(2) If the employe is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligation [2797] under his contract.

(3) If the employe holds unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by the consummation of the transaction herein approved and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this condition.

(c) No claim for loss shall be paid under the provisions of this condition which is not presented within one year after the date employe is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the

B. R. C. Exhibit A—(Continued)

loss under a contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employes and either or both of the said air carriers and in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employes and the said air carriers, respectively, and these two shall endeavor by agreement within ten days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser. A decision of a [2798] majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

Received November 16, 1949. [2799]

BROTHERHOOD OF RAILWAY CLERKS EXHIBIT B
(Supplement)

A list of employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes whom it is alleged have been furloughed or terminated as a result of the transfer of Route 68 by Western Air Lines, Inc., to United Air Lines, Inc., including the positions held by such employes prior to their transfers:

Denver, Colorado

Bower, D., Miss	Sr. Psgr. Serv. Supply Clerk	Position Abolished
Callahan, B.	Cargo Handler	Furloughed
Chelf, Phillip F.	Lead Cargo Clerk	Services Terminated
Elliott, A. R.	Cargo Handler	Position Abolished
Glaze, R. E.	Cargo Handler	Furloughed
Lisco, L., Miss	Psgr. Serv. Supply Clerk	Furloughed
McAndrews, E. R.	Cargo Handler	Furloughed
Rohan, F. M.	Sta. Psgr. Agent	Probably Reduced
Seveik, W.	Cargo Handler	Furloughed
Tomlin, R., Miss	Psgr. Serv. Supply Clerk	Furloughed
Toomer, H.	Ass't Cargo Clerk	Furloughed Temporarily
Young, R.	Ass't Cargo Clerk	Furloughed

List of personnel covered by paragraph (1) discharged (services terminated, furloughed) by Western Air Lines, Inc., and since reemployed including the names of employer:

Denver, Colorado

Elliott, A. R.	Cargo Handler	Now with Monarch Airlines

List of employes transferred from Denver as a result of sale of Route 68 and alleged loss by reason thereof.

Denver, Colorado

Jacobs, Joe	Cargo Clerk	Transferred to San Francisco—moving expenses partly paid by carrier—employe paid same from Denver to Salt Lake.
Moore, Howard E.	Fleet Serv. Man	Transferred to San Francisco—loss of salary Sept. 14 to Oct. 1.
Pope, C. T.	Sta. Psgr. Agent	Transferred to San Francisco—drove own car—not reimbursed therefor.
Ross, R. H.	Sta. Psgr. Agent	Transferred to Los Angeles—moving expenses not paid.
Swift, T. G.	Sta. Psgr. Agent	Transferred to San Francisco—salary lost by reason thereof—four days—drove own car—not reimbursed for same.

Received November 16, 1949.

BROTHERHOOD OF RAILWAY CLERKS EXHIBIT B

A list of employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees whom it is alleged have been furloughed or terminated as a result of the transfer of Route 68 by Western Air Lines, Inc., to United Air Lines, Inc., including the positions held by such employes prior to their transfers:

Name	Position Prior to Transfer Termination or Furlough	Compensation Prior to Transfer Termination or Furlough	Record of Service	Present Employment	Present Compensation
Callahan, B.	Cargo Handler	$166.40 per mo.	May 10, 47—Aug. 20, 47	Unemployed	
Chelf, Phillip F.	Lead Cargo Clerk	$ 1.12 per hr.	Approx. 3 years	Out of State	
Elliott, A. R.	Cargo Handler	$166.40 per mo.	Oct. 21, 46—Sept. 2, 47	Monarch Airlines	$150.00 per mo.
McAndrews, E. R.	Cargo Handler	$ 1.04 per hr.	May 15, 46—Sept. 14, 47	Unemployed	
Toomer, H.	Ass't Cargo Clerk	$ 1.12 per hr.	Dec. 1, 45—Sept. 18, 47	Rehired, Sept. 25, 1947	$ 1.12 per hr.
Jacobs, Joe	Cargo Clerk	$ 1.32 per hr.	Approx. 4 years	Western Air Lines (S.F.)	$ 1.32 per hr.
Moore, Howard E.	Fleet Service	$ 1.04 per hr.	Approx. 2½ years	Western Air Lines (S.F.)	$ 1.04 per hr.
Pope, C. T.	Station Agent	$195.00 per mo.	18 months	Unknown	
Ross, R. H.	Station Agent	$195.00 per mo.	July 15, 46—Sept. ?	U. S Navy	
Swift, T. G.	Station Agent	$205.00 per mo.	Approx. 3 years	Unknown	

Received November 21, 1949.

Law Offices

Rauh and Levy

1631 K Street, Northwest

Washington 6, D. C.

February 9, 1950

Civil Aeronautics Board

Commerce Building

Washington 25, D. C.

Re: United Airlines-Western Airlines Route #68—Docket No. 2839.

Gentlemen:

Pursuant to Examiner Wrenn's letter of January 17, 1950, regarding the filing of briefs in the above-entitled matter, we wish to take this opportunity to point out to the Board the circumstances surrounding the failure of the International Union, United Automobile, Aircraft, Agricultural Implement Workers of America (UAW-CIO), to be present at the hearing on November 14, 15, 16 and 17, 1949, and to make it clear that the UAW's failure to appear at that hearing is not to be regarded as an indication of a lack of interest in the final disposition of this case.

Although the UAW was a party to this proceeding, and although a member of this firm was an attorney of record, neither the Union nor this office received any notice of the November hearing. Nor

did we know anything about the hearing until many weeks after it had adjourned. Subsequently, we learned that a notice of the hearing was sent by registered mail to Mr. William W. Kramer who was formerly with this office, but that the notice was returned undelivered to the Civil Aeronautics Board. In checking into the matter further, we found that although the Civil Aeronautics Board has the correct address of this office, the letter to Mr. Kramer was incorrectly addressed to 1321 K Street. Although the letter was returned to the Civil Aeronautics Board, and although it was clearly misaddressed, no further effort was made to notify us of the hearing. However, it appears that the record of the case is at present sufficiently complete to warrant the Board's applying the "Burlington Formula" to employees adversely affected [3064] by the route sale, and it would seem to be unnecessary to incur the increased expense and delay that a reopened hearing would entail.

The position of the UAW-CIO was made clear at the October 11, 1948, pre-hearing conference and in the exhibits we submitted on November 12, 1948. This position is substantially the same as that of the Brotherhood of Railway and Steamship Clerks, namely, that the appropriate method of handling the problem adversely affected employees is the application of the "Burlington Formula."

We, therefore, join the Brotherhood of Railway and Steamship Clerks in urging the Board to adopt the "Burlington Formula" as the most equitable

means of adjusting the compensation of those employees who were unwilling casualties of the United Airlines' sale of Route 68 to Western Airlines.

A copy of this letter is being sent to each party of record.

Sincerely yours,

/s/ IRVING J. LEVY,

General Counsel, International Union, United Automobile, Aircraft, Agricultural Implement Workers of America (UAW-CIO).

Received February 13, 1950. [3065]

Before the Civil Aeronautics Board

February 21, 1950.

BRIEF IN BEHALF OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

Introductory Statement

This proceeding arises out of the petitions of the Air Line Pilots Association, Airline Mechanics Divisoni, UAW-CIO, and of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, each requesting reconsideration of the Board's Order, Serial No. E-772, of August 25, 1947, and the modification of said Order so as to impose conditions for the pro-

tection of employees alleged to have been adversely affected by the transfer of Route 68 by Western Airlines, Inc., to United Airlines, Inc. The Board on August 25, 1948, in response to said petitions ordered the proceeding reopened to determine the questions raised thereby.

Statement of the Case

The Board on August 25, 1947, issued its Order, Serial No. E-772, approving the transfer of Route 68 and certain physical properties by Western Airlines, Inc., to United Airlines, Inc. In doing so, the Board denied the request to [3071] invoke protective conditions for the protection of employees who were or may be adversely affected by such transaction. In its opinion the Board said in part:

> "There is nothing that would indicate that any of the rights of Western's present employees on Route No. 68 will be prejudiced by the acquisition and separation of that route by United. * * *" (Opinion page 24.)

This finding, as the Board's statement indicates, (p. 2, of its Order of August 25, 1948), was based on the testimony of Mr. Drinkwater, President, Western Airlines, Inc., to the effect that no employee of Western will be released because of this transaction, and that every competent employee in the employ of that Company at Grand Junction and Denver, will continue with Western. (TR 106-9, Hearing of May 20, 1947; Board's opinion pp. 23-24 of August 25, 1947.) This same testimony by Mr.

Drinkwater also apparently misled Counsel for United. (Brief to the Board of United Airlines, Inc., of June 20, 1947, pp. 54, 55.)

Subsequently the aforementioned petitions for reconsideration were filed. In a letter dated November 5, 1947, the then Chairman of the Board, James M. Landis, advised that the Board had considered the petitions for reconsideration and modification of the Board's Order approving transfer of Route 68 and had determined that before action is taken on these petitions, a conference of all parties should be held with the Board in an effort to reach an agreement as to the disposition of the issues presented. It was requested that the Board be furnished with the following information to serve as a basis for an approach to the meeting.

(1) A list of all employees represented by your organization whom it is alleged have been furloughed or terminated as a result of the transfer of Route 68, including the positions held by such employees prior to the transfer, their compensation, the date of their furlough or termination and their record of service with Western.

(2) A list of any personnel covered by paragraph (1) discharged by Western and since reemployed including the name of the employer, the date of employment and compensation.

(3) A copy of any agreement between your organization and Western with respect to the furlough or termination of employees. [3072]

The Brotherhood transmitted this information to the Board on November 19, 1947. The conference

was held by the Board, attended by its General Counsel at Washington, D. C., on December 5, 1947, with all parties present and stating their position in the matter.

Thereafter, the Board expressed an opinion that the parties should attempt to settle the matter among themselves and instructed them to arrange a conference for that purpose. In commenting thereon, the then Chairman Landis recommended the Burlington Formula as a pattern for a basis of employee protection. The parties were further instructed that they should give due consideration to any contentions offered by either party, but such contentions were not to be arbitrary or for the purpose of delay, and an honest effort should be made to settle the controversy. It was also pointed out by the then Chairman Landis speaking for the Board, that these negotiations must be limited to the question of an adoption of a formula for employee protection and not to include any discussion relative to the status of employees already adversely affected or those that may be in the future. Otherwise, he stated, the matter was to be referred back to the Board and they would then adopt or invoke an appropriate formula for the protection of the employees.

On or about December 11, 1947, the parties met at Los Angeles, California, in accordance with the Board's suggestion, but Western's representatives Mr. Drinkwater and Mr. Kelly, contrary to the Board's instructions not to include any discussion relative to the status of employees adversely af-

fected or that may be in the future, insisted that the labor organizations involved, should first furnish them with information as to just who had been adversely affected. In other words, that the labor organizations should show specific cases of adverse effect before considering a formula for their protection. (TR 883.)

On December 29, 1947, we advised the then Chairman James M. Landis, of Western's attitude and their insistence that the unions [3073] should furnish them with information as to who had been adversely affected before they would consider the question of an appropriate formula. On March 25, 1948, the Acting Chairman of the Board Mr. Oswald Ryan wrote Mr. Drinkwater, President, Western Airlines, Inc., in part as follows:

> "* * * the Board has been advised of the failure of your company and the named labor organizations to reach any agreement regarding the problem of employees who may have been adversely affected by the transfer of Route 68. As we understand the situation there is a basic difference between your company and the labor organizations which centers around the question of whether a determination would be made as to just which and how many employees of Western have been adversely affected by the transaction between Western and United, before working out any provisions governing the treatment to be accorded any such employees along the lines of the Burlington Formula or upon any other mutually acceptable basis.

"In recommending to the parties that they use the Burlington Formula as a guide in negotiating terms and conditions which might appropriately be applied in relation to this transaction, the Board had in mind that the parties would first formulate the general principles to be agreed upon, and that any determination as to just which and how many employees had been adversely affected would be deferred until the formula had been established. * * * Disputes between the company and labor organizations as to whether a given employee or a group of employees is to be accorded the benefits of the formula when established seemed to the Board more properly to be matters to be resolved subsequently by the parties, either by voluntary negotiation or through arbitration in accordance with an arbitration provision included in the formula. * * * This procedure is consistent with that which has regularly been followed by the Interstate Commerce Commission in like situations.

"It is therefore recommended to all concerned that an attempt be made to agree first on the terms of a formula which will be the basis for determining the treatment to be accorded to any employees who may be found to have been adversely affected, and the question of whether any employees, and if so, which employees are entitled to the benefits provided by the formula thereafter be settled by negotiation or by arbitration. It is hoped that pursuant

to this recommendation your company and the labor organizations involved will be able to agree upon a formula including a procedure for its specific application, and thereafter to apply it all without further resort to formal proceedings before the Board."

Again the parties convened at Los Angeles, California, and once again the representatives of Western Airlines, Inc., took the same position as before. Accordingly, under date of July 9, 1948, we advised Mr. Joseph J. O'Connell, Jr., Chairman of the Board, and set forth the report of the Brotherhood's representative at that conference as follows: [3074]

"At this conference the same situation developed as heretofore existed; that is, the Company insisted that we show evidence as to some employee who was adversely affected by reason of the sale before even discussing the make-up of any formula. It was our viewpoint that such a procedure, is contrary to the recommendations of the C.A.B. as contained in letter of Acting Chairman Ryan dated March 25, 1948. Substantially, however, the Company's position has not changed from that indicated in my letters to you of December 15 and 20, 1947."

We concluded by informing Chairman O'Connell as follows:

"It is obvious by reason of the Western Airlines representative's open defiance of the Board's recommendation and instructions noth-

ing can be accomplished by any further conferences with them."

Subsequent thereto, and on August 25, 1948, the Board issued its Order reopening the matter for reconsideration.

Received February 23, 1950. [3075]

United States of America Civil Aeronautics Board
Washington, D. C.

Docket No. 2839

UNITED-WESTERN ACQUISITION AIR CARRIER PROPERTY.

Decided: July 7, 1950

Order approving transfer of Route 68 and related physical properties by Western Air Lines, Inc., to United Air Lines, Inc., amended to impose conditions for the benefit of adversely affected employees sustaining certain types of monetary loss as a result of the transfer.

Appearances:

D. P. RENDA,
For Western Air Lines, Inc.

JAMES FRANCIS REILLY, and
C. F. McERLEAN,
For United Air Lines, Inc.

F. HAROLD BENNETT,
For Air Line Pilots Association.

JAMES L. CRAWFORD, and
EDWARD J. HICKEY, JR.,
For Brotherhood of Railway and Steamship Clerks.

MITCHELL J. COOPER,
For International Union UAW-CIO.

WILLIAM F. KENNEDY, and
FREDERICK W. BECHTOLD,
Public Counsel.

OPINION IN REOPENED PROCEEDING

By the Board:

By order dated August 25, 1947, the Board approved the transfer of Route No. 68 operated by Western Air Lines, Inc., to United Air Lines, Inc., and also the acquisition by United of certain air carrier property owned by Western.[1] In the opinion the Board discussed the requests of intervenor labor organizations that employee protective conditions be attached to the sale, and declined to impose any such [3191] conditions on the ground that "there is nothing that would indicate that any of the rights of Western's present employees on Route No. 68 will be prejudiced by acquisition and operation of that route by United."

Subsequent to the transfer and the inauguration of operations over Route No. 68 by United, but

[1]Reported in 8 CAB 298.

within the time prescribed by the Board's Rules of Practice, the intervenor, Air Line Pilots Association (hereinafter referred to as ALPA), filed a petition requesting reconsideration of the Board's order and the imposition of employee protective conditions. About the same time the employees of Western represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers Express, and Station Employees and by the Airline Mechanics Division UAW-CIO requested reconsideration of the Board's decision in the case. Thereafter a conference of all parties was held with the Board at which time the Board instructed the parties to attempt to settle the matter among themselves and to arrange a conference for that purpose. Conferences were held by the interested parties and the Board was advised of inability to reach any agreement upon the issues involved.

By Order Serial No. E-1894, dated August 25, 1948, the Board ordered that this proceeding be reopened to determine:

(1) Whether any employees of Western Air Lines, Inc., have been adversely affected as a consequence of the transfer of Route No. 68 and certain physical properties by Western Air Lines, Inc., to United Air Lines, Inc., and

(2) What conditions, if any, for the protection of employees of Western Air Lines, Inc., who may have been adversely affected, should be attached to the Board's approval of said transfer of Route No. 68 and certain physical

properties granted in order Serial No. E-772, dated August 25, 1947."

Further hearing upon these issues was held before Examiner Thomas L. Wrenn. As the record in the original proceeding had been certified to the [3192] Board for decision no examiner's report was issued in the reopened hearing. At the close of the hearing parties requested oral argument before the Board which was heard and the case was submitted for decision.

It is the position of ALPA that the pilots of Western who operated over Route No. 68 should be taken over by United Air Lines and given full employment and seniority rights on that airline without prejudice. The Brotherhood of Railway and Steamship Clerks and the UAW-CIO urge that the Burlington Formula be imposed as a condition to the transaction for the protection of the employees who may have been adversely affected as a result of the route transfer. It is the position of Western (1) that no employees of Western were or have been adversely affected as a consequence of the transfer of Route No. 68 to United, and (2) that such alleged consequence does not lead to any necessity for the application of the Burlington or any other so-called formula to take care of employees and that the attachment of such conditions to the Board's original order in the case is not necessary. United stands on the agreement it executed for the purchase of Route No. 68; it did not at any time agree to take on any pilots or other employees of Western as part of the transaction. It will not

agree to take any of Western's employees stating that it would be adversely affected if it took on any Western pilots for the reason that it has a substantial number of pilots on furlough. It asserts that it must take the responsibility for the safety of its operations and therefore that it must have full authority to make its own selection of employees and in more particular, pilot employees.

ALPA contends that the pilots of Western were adversely affected as a consequence of the transfer of Route No. 68. It points out that at [3193] the time of the original hearing in this case the president of Western stated that a minimum of 14 crews or 28 pilots were operating on Route No. 68. It is pointed out that at the same time a minimum of 7 pilots were necessary to keep each DC-4 aircraft which Western was operating over Route No. 68, in normal operation. It also pointed out that Western turned over to United 4 DC-4 aircraft which were not replaced. ALPA asserts that immediately after Route No. 68 was transferred Western furloughed 23 pilots which is almost the same number of pilots it would have taken to keep the 4 DC-4 aircraft in operation. It is claimed that the transfer of Route 68 caused a reshuffling of the Western pilots on that route who were the most senior upon the Western system, with the result that they took jobs on other segments and pilots lower down the seniority list were removed. In addition to the foregoing, ALPA contends that the sale of Route No. 68 had other adverse effects on Western pilots in that the aircraft miles flown were less, revenue

aircraft miles flown were less, aircraft hours flown were less, passenger miles declined, that Western pilot personnel flew fewer and smaller aircraft after the sale of Route No. 68, and that Western pilots had less night flying after the sale of Route No. 68. It is asserted that the extension of Route No. 63 from San Francisco to Seattle has not replaced Route No. 68 in mileage or in flying time. Other adverse effects alleged to have been suffered by Western pilots in consequence of the sale of Route No. 68 were forfeiture of seniority benefits such as promotion rights, the pilot's status and seniority number. It is also alleged that as a result of the sale of the route junior pilots of Western, almost without exception, are now further away from flying as captains than they were at the date of the sale, notwithstanding the passage of time and the expansion of Western's system by reason of [3194] the extension of Route No. 63. Three Western pilots appeared as witnesses and testified regarding reduction of flying status and loss of pay. These witnesses all stated that they are not seeking to recover any claim in dollars and cents against Western, that the purpose of submitting such testimony in the form of monetary loss was only for the purpose of establishing that the pilots had suffered adverse consequences as a result of the transfer of the route.

In submitting evidence as to the adverse effect on its membership, the Brotherhood of Railway and Steamship Clerks did not purport to include all of the employees who might have been or will be adversely affected by reason of the transfer of

Route No. 68. The witness who appeared for the Brotherhood stated that an employee may be adversely affected in several ways; such, as termination of employment, furlough, and transfer to a position of less remuneration through displacement by a senior employee. The Brotherhood points to an exhibit of Western containing the names of a number of employees who received a letter dated September 9, 1947, notifying them that due to the disposal of Route No. 68 their furlough would begin effective September 14, 1947. The Brotherhood contends that this letter alone is justification for the Board finding that the employees so notified have been adversely affected by the sale of Route No. 68. The witness who appeared for the Brotherhood submitted information on the record of 17 Western employees it claims were adversely affected. The Brotherhood states that its approach to the problem has been to show through these sample cases that some adverse effect has occurred; that by reason of this fact it is sufficient for the Board to invoke protective conditions and the Board need not concern itself with the specific problems of the number of employees and the extent of [3195] adverse effect suffered by each, as such problems are those of the arbitration panel which would be set up under the provisions of the Burlington formula. The position of the UAW-CIO is substantially the same as that of the Brotherhood of Railway and Steamship Clerks.

As indicated, Western asserts that no employees were or have been adversely affected as a result of

the transfer of Route No. 68 to United, and that such alleged consequences do not lead to any necessity for the application of the Burlington or any other so-called formula to take care of the employees, and that the attachment of such a condition to the Board's original decision is not necessary. Western states that the pilots furloughed on September 17, 1947, were not furloughed as a result of the sale of Route No. 68, but because of many factors basically founded on low load factors and seasonal declines in business. It states that reductions in force followed the pattern of the general industry personnel reductions and that it was a part of an economy program in which Western was engaged beginning at the time that Mr. Drinkwater became president, January 1, 1947. It submitted an exhibit showing that as of December, 1946, Western had on its payroll a total of 2,342 employees, of which 424 were mechanics; that as of the end of the third quarter of 1947, after the sale of Route No. 68, total employees were 1,544 and mechanics 288; that as of the end of the third quarter of 1948, total employees had been reduced to 1,106 and total mechanics were reduced to 172. It points out that in that same quarter of 1948, Western was accepting delivery of ten new airplanes and had undertaken the operation of its own engine overhaul shop with substantially less mechanics than it had at the end of the third quarter of 1947. In the case of stock and storage employees represented by the Brotherhood of Railway and Steamship [3196] Clerks, Western points out that in December, 1946, it had 104 such

employees; that as of September 30, 1947, the number had been reduced to 40 and by the end of 1948 it had been reduced to 28.

With respect to the 17 so-called typical cases presented by the Brotherhood's witnesses, Western points out that 4 of these were terminated prior to August 26, 1947, the date of the Board's decision in this case, that 8 of the 17 were transferred to other Western Air Lines' stations and there is a conflict in the testimony as to whether any time was lost with respect to 5 employees, and with respect to 3 there is no conflict on that point. The remaining 5 were offered jobs at other stations but refused the transfer. Western asserts that with respect to these 17 cases there are instances where two or three employees may have lost several days time between transferring from one station to another, and one employee failed to receive full compensation for his moving expenses. Western also states that at the same time it was reducing personnel in Denver it was also reducing personnel in Salt Lake City, which had nothing to do with the sale of Route No. 68; that the average reduction of employment in Denver was 35 per cent while that in Salt Lake City was 68 per cent. Western directs attention to the fact that Grand Junction is the only station on Route No. 68 where service was eliminated completely, that with respect to the personnel at Grand Junction 3 of the station agents transferred to other points on Western, while the fourth man was furloughed and later employed by United. Other personnel there who were furloughed were offered jobs

and refused to transfer or were later employed by United. It is contended by Western that no one lost any time and that no one was adversely affected.

Western points out that the 14 crews who were flying Route No. 68 [3197] did transfer over to Route No. 63 so that there was a complete transposition of crews from Route No. 68 to Route No. 63. With respect to the 23 pilots furloughed, Western states that 7 were hired on or about September 30, 1947, after the original hearing in this case; that the remaining 16 all had to be furloughed in December, 1946; they were recalled in May or June, 1947, furloughed September 17, 1947, and recalled in the Spring of 1948, and furloughed again in the Fall of 1948; that they were the victims of customary normal trend of the business. Western also asserts that there is a decrease in the number of schedules operated in the summer and winter months and that it follows that pilots must be decreased or furloughed because of this; that the 23 are still employed by Western, having gone through that cycle from 1946, 1947, and 1948.

With respect to ALPA's exhibit which listed 21 pilots and tending to show that they had been adversely affected, Western submitted testimony to indicate that in 16 cases not only did these pilots make more money after the sale of Route No. 68 but it was only in 3 cases that there was any decrease in their earnings in 1948 as compared with 1947. Western asserts that some pilots took leave for personal reasons, but that a comparison of earn-

ings in 16 out of 19 cases show that the pilots were making more money in 1948 than they were in 1947 when they were flying Route No. 68. Western submitted an exhibit chronologically showing every pilot through his employment experience from 1946 through 1948 which shows that in each year they were furloughed in the fall or winter and called back in the spring. Western points out that in 1946 it was able to fly 6 schedules between Denver and Los Angeles because it was the only major carrier connecting with United at Denver using four-engine equipment. It refers to the Board's decision in May, 1947, consolidating United's [3198] routes and permitting it to fly nonstop from Chicago to Los Angeles as affecting Western's Los Angeles-Denver business, with the result that shortly thereafter Western reduced schedules over that route. It asserts that this reduction in schedules over Route No. 68 was purely the result of reduction in traffic and did not come about as a result of anticipation of approval of the sale of Route No. 68.

United points out that the Board's order approving the transaction was issued August 25, 1947; that the contract before the Board was explicit in its terms as to when the transfer of the property and the transfer of the certificate would take place; that United first flew schedules on Route No. 68 on September 15, 1947, and that it was not until September 23 that ALPA filed its petition for reconsideration of this case. United asserts that for the Board to attempt to impose conditions now which would be retroactive to August, 1947, would be to

ask United to accept a transaction which on the terms of the contract and evidence of record it implicitly and expressly refuses to accept. United questions the power of the Board to take such action and argues that, even if it did, United should not be asked to go back and remake a deal which the Board has allowed to be consummated and to continue for so long a time, especially where United has no responsibility for the delay in the final determination of the matter.

Public Counsel believe that the circumstantial inference from the record is that a substantial number of Western employees were adversely affected by the transfer of Route No. 68. This conclusion is based upon the following statistics: The number of aircraft miles Western flew dropped from approximately 746,000 miles in August, 1947, to 538,000 miles in October, 1947. From February through July, 1947, Western operated [3199] 3,900,000 aircraft miles. Subsequent to the transfer for the same six-month period of 1948, Western operated only 3,300,000 aircraft miles, a reduction of 15 per cent. A comparison of the same period shows a 15 per cent drop in aircraft hours and approximately the same drop in revenue aircraft hours. In passenger miles Western operations declined from 95,000,000 passenger miles in the period, February through July, 1947, to 57,000,000 in the same period of 1948, a reduction of 40 per cent. Available seat miles for the same period dropped 23 per cent. Public Counsel believe that there was a loss of employment opportunity resulting from the decline of aircraft

miles and also fewer aircraft miles were flown on two-engine aircraft on which the pilots received a lower rate of pay. Public Counsel contended that the Board should impose protective conditions of the Burlington formula for the benefit of the adversely affected non-flight personnel and that the Board should order Western to pay the cost of applying the conditions of such formula. Public Counsel also believe that the Board should request United to absorb six Western pilots found to have been adversely affected by the transfer in arbitration proceedings between the pilots of Western and of United but that if United refuses to accept such pilots the Board should impose the protective conditions of the Burlington formula for the benefit of the adversely affected pilots. Public Counsel believe there are serious doubts as to whether the Board has the legal power to impose such a condition on United at this time in view of the fact that United consummated the transaction after it had been approved without conditions for the benefit of adversely affected employees on the assumption that there would be no such conditions and that it is not now practical to undo the transaction and restore United to the position it [3200] occupied before the transaction was consummated.

The record establishes that some Western employees were adversely affected by the transfer of Route 68 and the four DC-4's. It is not disputed that a substantial number of Western employees were furloughed or terminated subsequent to the consummation of the agreement with United. It is

also undisputed that subsequent to that time, certain other personnel were reduced in status and that their compensation was correspondingly reduced. It is contended by Western that these reductions in force and in compensation were attributable either to seasonal cutbacks or to the economy program of Western's management which commenced in 1947.

It may be that some of the employees who were furloughed or reduced in status would have suffered these consequences regardless of the transfer of Route 68 and the four DC-4's. But it seems to us clear that a portion of the employees who suffered adverse consequences would not have suffered them if Western had not transferred Route 68 and the equipment necessary to operate it. Western would certainly have had to retain some of the employees it furloughed in order to operate Route 68.

This conclusion is reenforced by the fact that on September 19, 1947, Western notified twelve of its ground employees at Denver in writing that they were being furloughed "due to the transfer of Route 68." Western says that these particular employees were offered the right to exercise their seniority rights at other stations. But if seniority rights were exercised, then the employees on the bottom of the list who were bumped as a result of the exercise of seniority were adversely affected by the transfer of Route 68.

An illustration of the operation of the exercise of seniority rights is afforded by the testimony of the ALPA witnesses, Horn and Hoagland, [3201]

who stated that they had been demoted and their compensation reduced when senior pilots moved into their base after the transfer of Route 68.

We do not believe we should undertake to determine specifically which employees were adversely affected by the transfer of Route 68 and the four DC-4's and, in any event, we could not do so on this record. For present purposes, it suffices that the record does show that some employees of Western were adversely affected by the transfer of Route 68 and the four DC-4's by Western to United.

Our attention will be directed next to the questions whether the Civil Aeronautics Act empowers the Board to impose employee protective conditions in approving route transfers; whether any protective conditions should be imposed in this case and, if so, what they should be.

The principal transactions involved in this proceeding were the transfer by Western to United of the certificate for Route 68 and the concurrent acquisition by United from Western of four DC-4 aircraft and spare parts. The certificate transfer is subject to section 401(i) of the Act, and the acquisition of the related physical properties is subject to section 408(a)(2) which makes unlawful without our approval, the purchase by one air carrier of a substantial part of the properties of another.

Subsection (b) of section 408 confers upon us express authority to attach to our approval of a transaction subject to its provisions such terms

and conditions as we shall find to be just and reasonable and also to prescribe modifications of the transaction. The Board has no express authority to impose conditions in passing upon the transfer of a certificate under section 401(i). But it would seem clear that the power of the Board to approve or disapprove a certificate transfer includes the power to grant approval contingent upon compliance with specified conditions. The short [3202] answer to any challenge to the Board's power to impose conditions in a certificate transfer case is that by imposing conditions, the Board finds that without the conditions the transfer is not consistent with the public interest and should be disapproved. Hence, the imposition of conditions does no more than give the parties to a certificate transfer an opportunity to modify the basis of their transaction and thereby to avoid the order of disapproval which the Board would otherwise be compelled to issue. Air Cargo, Inc., Agreement, 9 C.A.B. 468 (1948).

Any doubts as to whether the general authority under sections 401(i) and 408(b) to attach conditions to an order of approval issued thereunder includes the power to impose conditions for the benefit of adversely affected employees are set at rest by three decisions of the Supreme Court. United States v. Lowden, 308 U. S. 225 (1939); Interstate Commerce Commission v. Railway Labor Executives Association, 315 U. S. 373 (1942); Railway Labor Executives Association v. United States, 339 U. S. 142 (1950). For present purposes, the net of these decisions is that although the Board

need not impose conditions for the benefit of adversely affected employees in cases involving route transfers, acquisitions, and mergers, it may do so in its discretion.

The situation is not altered in this case by reason of the fact that we have already approved the transfer of Route 68 and related physical properties by Western to United without conditions for the benefit of adversely affected employees and that the transfer thus approved has been consummated. As our opinion makes clear, in declining to impose conditions for the benefit of Western's employees in our original order of approval, we relied on the representations of Western's president that its employees would not be adversely affected by the transfer. United-Western, Acquisition [3203] of Air Carrier Property, 8 C.A.B. 298, 311. Regardless of whether we could modify our order to impose such conditions in the absence of those representations, we think it clear that Western by reason of them is estopped to challenge any such modification in this proceeding.

It is not suggested that there was any intent on the part of Western to mislead the Board. The existence of such an intent is immaterial. The significant facts are that the representations were made, that the Board relied on them, and that they have now proved to be erroneous.

Since, therefore, we clearly have discretion to impose in this proceeding conditions for the benefit of adversely affected employees, the crucial question is how we should exercise that discretion. We

find very persuasive in this connection not only the fact that the Interstate Commerce Commission has frequently imposed conditions for the benefit of adversely affected employees but that Congress has made their imposition by the Commission mandatory in certain situations. Section 5(2) (f) of the Transportation Act of 1940 (49 U.S.C., sec. 5(2) (f). Similar but more elaborate protective provisions have also been imposed by statute with respect to the merger of telegraph carriers. Section 222(f) of the Communications Act (47 U.S.C., sec. 222(f)).

A route transfer or a merger or a similar transaction presumably involves benefits to the stockholders of the companies who are parties to it. On balance, it must also benefit the public as a whole; otherwise, we would disapprove it. Very often, these benefits to the stockholders and to the public will be at the expense of some of the employees of the companies involved. We think it only equitable that in such circumstances, the hardships borne by adversely affected employees should [3204] be mitigated by provisions for their benefit.

This consideration is reenforced by the practical one adverted to in United States v. Lowden and Interstate Commerce Commission v. Railway Labor Executives Association, supra. The Supreme Court there emphasized "the national interest in the stability of the labor supply available to the railroads." There is also an obvious national interest in taking steps to see to it that route transfers and mergers which are in the public interest should not

be prevented or delayed by labor difficulties arising out of hardships to employees incident to such route transfers or mergers.

Because of these specific considerations and because we are bound to pay considerable deference to determinations by Congress and by the Interstate Commerce Commission of what is desirable public policy in comparable situations, we find that it would be just and reasonable and in the public interest to impose in this proceeding conditions for the benefit of adversely affected employees.

The next problem to be resolved is what protective conditions should be accorded the employees adversely affected by the transfer.

ALPA has recommended that we require United to integrate into its seniority list six Western pilots to be designated pursuant to a formula arrived at by arbitration between Western pilots and United pilots. However, Public Counsel suggest that there is some doubt of our legal power to order United to absorb these employees in light of the peculiar facts of this case.

It is not necessary for us to decide this question of our legal power. Under the circumstances present herein, we do not deem it appropriate or practical to apply such condition to United [3205] retroactively.

United consummated the transaction with Western in good faith and on the supposition that it would not be required to absorb any employees of Western. To impose conditions which might substantially affect United's employee relations now

after the agreement has been fully performed and when it is difficult to undo the transaction would hardly seem fair to United.

This consideration militates not only against ALPA's proposal that we require United to absorb the six pilots but also against Public Counsel's suggestion that we request United to do so.

We wish to make one thing clear. Our decision in this case is not intended as a general rejection of the position that an acquiring carrier should be required to absorb employees of an acquired carrier or employees engaged on an acquired route. We leave that question open for future cases. In this proceeding, we hold only that in the circumstances here presented it would not be just and reasonable or in the public interest to compel United to absorb any employees of Western.

The Mechanics and the Brotherhood have recommended the imposition of the Burlington Formula for the protection of the employees they represent.

The Burlington Formula derives its name from an abandonment case decided by the Interstate Commerce Commission. Chicago, Burlington, Quincy Railroad Abandonment, 257 I.C.C. 700 (1944). There, the Commission, exercising discretionary power under section 1 (20) of the Interstate Commerce Act, provided terms and conditions for the protection of employees adversely affected by an abandonment. [3206]

The set of conditions provided in the Burlington case grew out of the Washington Job Protection

Agreement of 1936. This agreement resulted from conferences held between representatives of the Railway Labor Executives Association, an association composed of the various standard railway labor organizations representing the greater majority of railroad employees in the United States, and the Association of Railroads, an organization composed of the presidents of approximately all class I railroads. These conferences were held for the purpose of negotiating a national agreement which would give to railroad employees specific protection in what are generally referred to as coordination cases subject to approval by the Interstate Commerce Commission.

The principal features of the Burlington Formula are as follows:

1. A dismissal allowance equal to the employee's salary shall be paid to employees who are discharged as a result of the transaction;

2. A displacement allowance equal to the difference between old and new salaries shall be paid to employees who are assigned to a lower paying position as a result of the transaction;

3. The payments described in paragraphs 1 and 2 shall continue for four years or for the period the employee was employed by the carrier, whichever is shorter; the dismissal allowance shall be reduced by the amount of any wages or salary received by an employee in a new position;

4. Where personnel are transferred, the carrier

shall pay moving expenses and losses incident to a forced sale of a home or a forced cancellation of a lease; the amount of the loss shall be determined by a board of real estate appraisers;

5. Disputes arising under the protective provisions shall be arbitrated.

After consideration of these conditions, we are not prepared to say without further study and experience that they should be applied without modification in cases involving airline mergers and route transfers. The provisions of the Burlington Formula were worked out [3207] in the railroad industry not by administrative order but by a process of collective bargaining between substantially all elements of labor and management in that industry. Unforunately, we do not have the benefit of collective bargaining on this subject in the airline industry.

Further, the provisions of the Formula were developed in an industry where conditions were somewhat different from those of the airline industry. Finally, they were developed originally in the 1930's when the unemployment problem in the country as a whole was considerably more serious than it is at present.

We do not suggest that even after consideration is given to these last two factors, the terms of the Burlington Formula may not prove to be the most desirable way of providing for employees adversely affected by airline mergers and route transfers. Nor do we suggest that such provisions as may ultimately be adopted by us as a matter of general

policy in cases of this sort should be less favorable to adversely affected employees than those of the Burlington Formula. It may well be that in some respects, they should be more favorable. We hold only that we are not prepared to adopt the Burlington Formula at this time and in this case.

The most desirable way to work out conditions for the benefit of employees adversely affected by mergers or route transfers in the airline industry is, as we have indicated, by collective bargaining between management and airline labor organizations. We take this opportunity to urge all concerned to undertake such negotiations as soon as feasible.

We have said on numerous occasions, and we repeat here, that some realignment of the air transport map by mergers and route transfers would be in the public interest. It would be an act of statesmanship [3208] for airline managements and airline labor organizations to work out by voluntary negotiation a general program to mitigate the hardships to employees incident to such transactions. We would not, of course, be bound by the results of such collective bargaining, but we would certainly accord them considerable weight.

Although we are not prepared to adopt the Burlington Formula in toto, we have, in the absence of a collective bargaining agreement on the subject in this industry, resorted to it for guidance in determining what provisions should be imposed for the benefit of Western's adversely affected employees.

In the present case, we find that it would be just and reasonable and in the public interest to impose conditions providing in general that adversely affected employees shall be compensated for losses in the following categories: (i) loss of salary attributable to furlough or termination of employment; (ii) loss of salary attributable to reduction to a lower paying position; and (iii) moving expenses and transportation charges incurred as a result of being forced to accept a position in a different locality.

Losses in these categories are direct and relatively easy of ascertainment. The Burlington Formula provides in addition for recovery of losses sustained as a result of the forced sale of a home or the forced cancellation of a lease. The likelihood that in a period characterized by a shortage of housing accommodations and rising real estate values such losses have been sustained in substantial amounts by very many employees does not seem to us to be sufficiently great to warrant the imposition on Western of the burden and expense of going through appraisal proceedings to pass upon claims for such losses. Accordingly, [3209] we find that it would not be just and reasonable or in the public interest to impose on Western the obligation to arbitrate or pay such claims.

In accordance with the practice followed under the Burlington Formula, we will not undertake to determine individual claims by adversely affected employees. We will leave such claims to be resolved by an arbitration tribunal to be created by Western

and its employees. The jurisdiction of the arbitration tribunal will extend not only to the question of what employees are adversely affected but also to the question of what compensation within the above categories should be paid such employees.

The latter question will, of necessity, be a broader one than it would be in an arbitration under the Burlington Formula. The arbitration tribunal will determine the proper and reasonable measure of compensation for losses sustained, as well as the actual amount of such compensation. A determination of the proper and reasonable measure of compensation will necessitate the resolution of a number of incidental questions. Among these is the question of what setoffs, if any, against loss of salary in the way of salary in other jobs or unemployment insurance or the like should be taken into account, as well as the question of what should be "the protective period," i.e., the period of time during which losses should be recognized.

We wish to emphasize that in making these determinations, the arbitration tribunal will be free to adopt some or all of the provisions of the Burlington Formula. As we have stated above, our failure to impose these provisions in our own order is not due to a conviction that they are unsound or undesirable, but rather to the fact that we have not as yet had sufficient experience to decide whether they are applicable in their [3210] entirety to the airline industry.

We have made it clear in the accompanying order that the benefits of the provisions set forth therein

shall be available to unorganized employees, as well as to those represented by labor organizations. We have, however, excluded from the benefits of the order employees other than flight personnel and dispatchers paid at a rate in excess of $6,500 per annum. Apart from flight personnel and dispatchers, employees receiving such salaries fall within the class of executive or supervisory personnel who have traditionally been excluded from the benefits of protective labor legislation. For example, the provisions in section 222(f) of the Communications Act for the benefit of employees who might be adversely affected by a merger of telegraph carriers were expressly made inapplicable to employees earning more than $5,000 per annum. It seems to us reasonable in view of the rise in living costs between 1943, the date of enactment of section 222(f), and the present time to fix a limit of $6,500.

We have not made this $6,500 limitation applicable to flight personnel or to dispatchers because in spite of their relatively high compensation, such personnel have traditionally been regarded not as executive or supervisory employees, but rather as falling within the class of persons entitled to claim the benefit of protective labor legislation. For an illustration of this fact with respect to flight personnel, we need look no further than section 401(1) of the Civil Aeronautics Act.

In the accompanying order, we have made it clear that Western and its employees may avoid arbitration if they can arrive at an agreement resolving the differences between them. We have also made

it clear that [3211] Western need not conduct separate arbitrations with each of the labor organizations and individuals concerned, since it seems to us that that would be unduly burdensome.

There remains the question of whether Western or United or both should bear the expense of complying with the arbitration tribunal's award of compensation to adversely affected employees, as well as so much of the expense of arbitration as is not borne by employees. For the reasons stated above in connection with the discussion of ALPA's proposals, we find that it would not be just and reasonable or in the public interest to impose the burden of complying with these conditions on United. Our omission in the original order of approval to provide for adversely affected employees was based on our reliance on the representations of Western's president that no such adverse effect would result. United-Western, Acquisition of Air Carrier Property, 8 C.A.B. 298, 311. These representations have not been borne out by experience. In these circumstances, we find that it would be just and reasonable and in the public interest to require Western to comply with these conditions and with the other provisions of the accompanying order.

An appropriate order will be entered.

O'Connell, Chairman; Lee and Adams, Members of the Board, concurred in the above opinion. Ryan, Vice Chairman, and Jones, Member, did not take part in the decision. [3212]

United States of America,
Civil Aeronautics Board
Washington, D. C.

Adopted by the Civil Aeronautics Board at Its Office in Washington, D. C., on the 7th Day of July, 1950.

Docket No. 2839

In the Matter of the Application of WESTERN AIR LINES, INC., and UNITED AIR LINES, INC., Under Sections 401, 408, and 412 of the Civil Aeronautics Act of 1938, as Amended, for an Order Approving an Agreement for the Sale of Certain Properties and the Transfer and Amendment of a Certificate of Public Convenience and Necessity.

ORDER MODIFYING ORDER APPROVING ACQUISITION

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly Sections 401, 408 and 412 thereof, having approved the transfer of Route 68 and certain physical properties by Western Air Lines, Inc. ("Western"), to United Air Lines, Inc., by Board Order Serial No. E-772, dated August 25, 1947, as amended by Order Serial No. E-786, dated September 10, 1947, and by Order Serial No. E-792, dated September 11, 1947; and

The Air Line Pilots Association International, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees,

and the Airline Mechanics Division, UAW-CIO, having filed petitions for reconsideration and modification of said order so as to impose conditions for the protection of employees alleged to have been adversely affected by the transfer;

The Board, by Order Serial No. E-1894, dated August 25, 1948, having ordered the proceeding reopened to determine (1) whether any employees were adversely affected by the transfer and (2) what conditions, if any, for the protection of employees adversely affected by the transfer should be attached to the Board's order of approval; and

A full public hearing having been held thereon and the Board, upon consideration of the record in the said proceeding, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part [3213] hereof;

It Is Ordered That the approval granted in Order Serial No. E-772, dated August 25, 1947, as amended, be and it hereby is made subject to the following additional terms and conditions:

1. Western shall, upon written request, submit to arbitration the following questions:

(a) The identity of the individual Western employees who sustained monetary losses in the categories specified in subparagraph (b) below as a result of the transfer by Western to United of Route 68 and related physical properties;

(b) The amount which each of such employees should be paid by Western to compensate them for

monetary losses sustained in each of the following categories:

(i) Loss of salary attributable to furlough or termination of employment;

(ii) Loss of salary attributable to reduction to a lower paying position;

(iii) Moving expenses and transportation charges incurred as a result of being forced to accept a position in a different locality;

2. A request for arbitration filed on behalf of employees represented by a labor organization shall be filed by such labor organization; a request on behalf on an employee not so represented shall be filed by such employee; Western shall not, however, be obligated to submit the questions defined in paragraph 1 above to more than one arbitration tribunal;

3. Nothing in this order shall preclude a determination of the questions defined in paragraph 1 above, insofar as they relate to employees of Western represented by a labor organization by agreement between Western and such labor organizations; nor shall anything in this order preclude a determination of the questions defined in paragraph 1 above, insofar as they relate to an employee or employees not so represented, by agreement between Western and such employee or employees;

4. The written request for arbitration shall be served on Western within thirty days of the date of service of this order unless the time for the service of such request shall be extended by agreement of Western and the labor organization or individual concerned;

5. The method of selecting the arbitrator or arbitrators and the procedure to be followed in the conduct of the arbitration shall be determined by agreement of Western and the labor organizations and individuals requesting arbitration; in the event that such agreement cannot be reached within forty days of the service of the request for arbitration, Western or the labor organization or individuals requesting arbitration may file with the Board an application requesting the Board to prescribe the method of selecting the arbitration tribunal and the rules in accordance with which the arbitration shall be conducted; the application shall be accompanied by a detailed draft proposal for a method of selecting the arbitration [3214] tribunal and for a procedure in accordance with which the arbitration shall be conducted; upon receipt of such application or applications, the Board will prescribe by order the method of selecting the arbitration tribunal and the rules for the conduct of the arbitration;

6. Claims on behalf of the employees for monetary losses in the categories described in paragraph 1(b) above as a result of the transfer of Route 68 and related physical properties alleged to have been sustained prior to the conduct of the hearing by the arbitration tribunal shall be filed with the arbitration tribunal in such form and within such time as that tribunal shall fix; if the arbitration tribunal shall determine that employees of Western who have sustained monetary losses in the categories defined in paragraph 1(b) above as a result of the

transfer of Route 68 and related physical properties subsequent to the date of the arbitration award should be compensated for such losses, and if it shall not make provision for subsequent losses in its arbitration award, it shall prescribe in such award a procedure for the filing and determination of claims for such subsequent losses; failure to file a request for arbitration pursuant to paragraph 2 of this order shall not preclude the filing of a claim on behalf of an employee with an arbitration tribunal subsequently established at the request of other labor organizations or employees;

7. The arbitration tribunal shall not entertain a claim on behalf of an employee who at the time the alleged monetary loss was sustained was receiving from Western compensation at a rate in excess of $6,500 per annum, provided that this limitation shall not apply to flight personnel or to dispatchers;

8. The expenses of such arbitration shall be paid in such manner as Western and the labor organizations and individuals requesting arbitration shall mutually agree; in the event that such agreement cannot be reached, Western shall pay the expenses of any arbitrator or arbitrators designated by it; the labor organizations and individuals requesting arbitration shall pay the expenses of any arbitrator or arbitrators designated by them; one-half of all other expenses, including the expenses of a neutral arbitrator or arbitrators, shall be paid by Western; the remaining one-half of such expenses shall be borne by the labor organizations and individuals

participating in the arbitration in such manner as they shall agree, or if they cannot agree, in such manner as the arbitration tribunal shall determine;

9. Western shall within such time as the arbitration tribunal shall fix comply with the provisions of the arbitration award;

10. Western shall file with the Board a copy of the award of the arbitration tribunal and of any agreement with any labor organization or individual resolving the questions defined in paragraph 1 above;

11. Western shall within such time as may be fixed by the arbitration tribunal file with the Board a report of compliance with the award of the arbitration tribunal and shall file a report of compliance with the provisions of any agreement arrived at in lieu of arbitration within fifteen days after such compliance;

12. The Board hereby retains jurisdiction of this proceeding for the purpose of modifying or clarifying any provision of this order and for the [3215] purpose of imposing from time to time such other or further terms and conditions as to the Board may seem just and reasonable.

By the Civil Aeronautics Board:

[Seal] /s/ FRED A. TOOMBS,
Acting Secretary. [3216]

Proof of Service

I hereby certify that on July 21, 1950, this document was served on all parties listed below.

/s/ N. B.,
Service and Mail Clerk.

Registered:

Air Line Pilots Assn., Int.; Att: Harold Bennett, 3145 W. 63rd St., Chicago, Ill.

Airline Mechanics Division, UAW-CIO, Irving J. Levy, Gen. Counsel, 1631 K St., N. W., Wash., D. C.

Brotherhood of Railway and Steamship Clerks, Frt. Handlers, Express & Station Employees; Att.: Mr. George M. Harrison, Cincinnati, Ohio.

Western Air Lines, Inc.; Att.: Paul E. Sullivan, 6060 Avion Drive, Los Angeles, California.

United Air Lines, Inc.; Att.: S. P. Martin, 5959 S. Cicero Avenue, Chicago, Ill.

Regular:

Larry Cates, Wash. Rep., Air Line Pilots Assn., Int., 1185 Nat'l Press Bldg., Wash., D. C.

Michael J. Keane, Jr., 910 - 17th St., N.W., Washington, D. C.

Henry Kaiser, 1830 Jefferson Place, N.W., Washington, D. C.

Mitchell Cooper, Rauth and Levy, 1631 K St., N.W., Washington, D. C.

Dominic Di Galbo, International Representative, Airline Mechanics Division, Newark, N. J.

James L. Crawford, 1015 Vine Street, Cincinnati, Ohio.

D. P. Renda, c/o Western Air Lines, Inc., 6060 Avion Drive, Los Angeles, California.

John T. Lorch, Mayer, Meyer, etc., 231 S. La Salle St., Chicago, Ill.

Paul M. Godehn, Mayer, Meyer, etc., 231 S. La Salle St., Chicago, Ill.

J. Francis Reilly, Commonwealth Bldg., 1625 K St., N.W., Washington, D. C.

Donald C. McBain, Counsel, 57 Air Lines Pilots in the Employ of United Air Lines, Inc., 3367 Rowena Avenue, Los Angeles, California.

Albert F. Beitel, Morris, KixMiller and Baar, American Security Bldg., Wash., D. C.

Edw. J. Hickey, Tower Bldg., Wash., D. C.

Special Messenger:

Burgess—POD.

Delany—POD.

Hawkins—POD.

Dayhoff—POD.

Docket, Section, Bulletin Board, Kinsey and Leasure.

Examiner: Wrenn B-101.

Public Counsel: Highsaw B-38.

Served July 21, 1950. [3217]

United States of America,
Civil Aeronautics Board

Adopted by the Civil Aeronautics Board at Its Office in Washington, D. C., on the 15th Day of August, 1950.

Docket No. 2839

[Title of Cause.]

ORDER EXTENDING DATE FOR FILING OF PETITION FOR RECONSIDERATION

The Board, by Order Serial No. E-4444, dated July 7, 1950, and its opinion attached thereto, having made its approval of the transfer of Route No. 68 and certain physical properties by Western Air Lines, Inc. (Western), to United Air Lines, Inc., subject to certain additional terms and conditions as set forth in such order;

Western, having filed with the Board a request for an extension of time in which to file a petition for rehearing, reargument, or reconsideration of said order and decision, alleging in support thereof that its staff is fully engaged in preparation for a series of proceedings during the month of August;

Western having also requested a stay of the Board's order and decision;

The Board, upon consideration of said petition, finding that:

(1) The public interest will not be adversely affected by granting the request for an extension of time in which to file a petition for rehearing,

reargument, or reconsideration, and the said request sets forth reasonable grounds for failure to file within the prescribed 30-day period;

(2) A stay of the Board's order and decision would delay the taking of certain steps as provided therein preliminary to carrying out of the additional terms and conditions and such preliminary steps do not impose any undue burden upon Western or any other affected parties; [3221]

(3) It is adverse to the public interest to grant Western's request for a stay of the Board's order and decision;

It Is Ordered That:

1. The period within which Western must file a petition for rehearing, reargument and reconsideration of the Board's opinion and order, Serial No. E-4444, dated July 7, 1950, be and it hereby is extended for a further period to and including September 21, 1950;

2. Western's request for a stay of the Board's decision and order be and it hereby is denied.

By the Civil Aeronautics Board:

[Seal] /s/ M. C. MULLIGAN,
Secretary.

Served August 16, 1950. [3222]

United States of America,
Civil Aeronautics Board

Adopted by the Civil Aeronautics Board at Its Office in Washington, D. C., on the 19th Day of September, 1950.

Docket No. 2839

[Title of Cause.]

ORDER No. E-4620

The Board, by Order Serial No. E-4512, dated August 15, 1950, having granted a motion by Western Air Lines, Inc. (Western), to extend the time for filing of a petition for rehearing, reargument, and reconsideration of the Board's opinion and order, Serial No. E-4444, dated July 7, 1950, and having denied in Order Serial No. E-4512 Western's motion for a stay of Order Serial No. E-4444; and

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (the Brotherhood), an intervenor in this proceeding, having thereafter filed a motion to clarify and modify Order Serial No. E-4512 so as to provide that the extension of time to file a petition for rehearing, reargument, and reconsideration shall be applicable to all other parties as well as to Western, and requesting that the Board extend the time within which the Brotherhood is required to file a request for arbitration pursuant to paragraph 4 of Order Serial No. E-4444 until thirty days after the Board issues its order upon rehearing, reargument, and reconsideration; and

The Board finding that:

1. The extension of time granted to Western to file a petition for rehearing, reargument, and reconsideration of the Board's opinion and order, Serial No. E-4444, dated July 7, 1950, was intended to be applicable to all parties of the proceeding and not just to Western, and the order does not require any modification in this respect; [3234]

2. It would not be desirable to postpone until Board action on the petitions for reconsideration the taking of preliminary steps pursuant to Order Serial No. E-4444, but, on the other hand, the employees represented by the Brotherhood should not be penalized for what appears to have been an inadvertent default;

It Is Ordered That:

1. That portion of the motion of the Brotherhood which requests that an extension of time to September 21, 1950, within which to file a petition for rehearing, reargument, and reconsideration of the Board's opinion and order of July 7, 1950, Serial No. E-4444, be granted to all other parties to this proceeding, as well as to Western, be and it hereby is dismissed as unnecessary;

2. The time within which written requests for arbitration pursuant to paragraph 4 of Order Serial No. E-4444 are required to be filed, be and it hereby is extended to a date fifteen days from the date of this order.

By the Civil Aeronautics Board:

[Seal] /s/ M. C. MULLIGAN,
Secretary.

Served September 19, 1950. [3235]

Before the Civil Aeronautics Board

Docket No. 2839

[Title of Cause.]

PETITION FOR REHEARING, REARGUMENT, AND RECONSIDERATION OF BOARD ORDER SERIAL No. E-4444, DATED JULY 7, 1950

Now comes the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (the Brotherhood), an intervenor in this proceeding, and, pursuant to the Board's Rules of Practice and also specifically pursuant to leave granted in the Board's Orders Serial Nos. E-4512 and E-4620 of August 15 and September 19, 1950, respectfully petitions this Honorable Board to grant rehearing and reargument on the Board's Order Serial No. E-4444, dated July 7, 1950, for the reasons hereinafter specified, and upon such rehearing and reargument to reconsider its said order and grant the relief herein requested.

Grounds Relied Upon

1. Said Order Serial No. E-4444 of July 7, 1950, provides in paragraph 12 thereof as follows:

> "The Board hereby retains jurisdiction of this proceeding for the purpose of modifying or clarifying any provision of this order and for the purpose of imposing from time to time such other or further terms and conditions as to the Board may seem just and reasonable." (Emphasis supplied.)

2. The Brotherhood respectfully submits that the said Order of the Board requires modification or clarification because the Board's Order is [3236] susceptible to possible misinterpretation of the extent to which (a) the Board has itself imposed specific conditions; and (b) the extent to which the Board has delegated the determination of specific conditions to an arbitration tribunal.

3. As we read the Board's opinion, attached to and made a part of its Order, we understand the Board to have found and concluded that it is not prepared to adopt the so-called Burlington Formula in toto as the conditions to be imposed; but that it has concluded to impose conditions providing that adversely affected employees "shall be compensated for losses in the following categories: (i) loss of salary attributable to furlough or termination of employment; (ii) loss of salary attributable to reduction to a lower paying position; and (iii) moving expenses and transportation charges incurred as a result of being forced to accept a position in a different locality." (Emphasis supplied.) The true intendment of the foregoing statement in the Board's opinion clearly appears to expressly provide compensatory remuneration for the specific types of adverse effect enumerated. The Board then goes on to expressly exclude any compensation for losses incurred by employees as a result of the forced sale of a home or the forced cancellation of a lease.

4. Finally, the Board concludes that in accordance with the practice followed under the Burlington Formula, it will not undertake to determine individual claims, but will leave the resolution of that question to an arbitration tribunal to be created by Western and its employees. By this we understand the Board to have empowered the arbitration tribunal to determine which of the employees suffered adverse effects of the type for which the Board has ordered compensatory remuneration. The Board further empowers the arbitration tribunal to decide the question of what compensation within the specified categories should be paid such employees. The Board, in explaining this further provision as entailing not only the actual amount of such compensation but also its proper and reasonable measure, gives examples of what it has in mind by mentioning possible setoffs and specifically including the question of the duration of time within which the compensatory benefits will be paid. [3237]

5. We respectfully submit that the question of how long the compensatory benefits should be made available to employees suffering adverse effects caused by the transfer of Route 68 by Western Air Lines, Inc. (Western), to United Air Lines, Inc. (United), is not a proper question for delegation to an arbitration tribunal, but is one properly within the exclusive statutory authority and responsibility of the Board itself to resolve. The duration of the so-called protective period, unlike the evidentiary determination of which employees have

been adversely affected by the transfer, is a condition the justness and reasonableness of which only the Board itself is authorized by statute to determine.

6. Apart from the question of the duration of the compensatory benefits, we do not understand the Board's opinion as delegating to the arbitration tribunal any authority to reduce the compensation due for salary losses or moving expenses below the actual amount of the losses incurred except for proper "set-offs," such as unemployment compensation or other job compensation. If such is not the intent of the Board in its opinion, the objections heretofore advanced in paragraph 5 above with respect to the duration of the protective period apply with equal force for precisely the same reasons. If we are correct in our understanding of the Board's intent, we respectfully submit that this portion of the Board's opinion requires clarification in order that there will be no misunderstanding of the extent of the arbitration tribunal's authority.

7. Finally, we submit that paragraph 6 of the Board's Order requires modification or clarification to the extent that it might be interpreted as empowering the arbitration tribunal to make any determination as to whether employees, shown actually to have sustained monetary losses in the categories defined in paragraph 1(b) of the Board's Order, should or should not be compensated for such losses. The Board itself has already determined that question, which it alone has the author-

ity to determine, by its finding in its opinion which states:

> "In the present case, we find that it would be just and reasonable and in the public interest to impose conditions providing in general that adversely affected employees shall be compensated for losses in the following categories * * *" (Emphasis supplied.) [3238]

Relief Requested

For the foregoing reasons, the Brotherhood respectfully requests that the following relief be afforded by the Board in this proceeding:

1. That the Board reconsider its Order Serial No. E-4444 of July 7, 1950, and upon such reconsideration modify or clarify said Order and the opinion of the Board thereto attached so that it is clearly provided that:

> a. All conditions for the protection of employees adversely affected, as limited by paragraph 1(b) of the Board's Order, by the transfer of Route 68 by Western to United, including the duration of the period of protection and the measure of the compensation to be accorded employees found to be so affected, are imposed by the Board itself and not delegated for determination by an arbitration tribunal;
>
> b. The jurisdiction of the arbitration tribunal is limited (1) to a determination of which employees are shown by evidence submitted to said tribunal to have incurred mone-

tary losses in the categories specified in paragraph 1(b) of the Board's Order; and (2) to a determination of what salary offsets, as defined in the Board's Order, should reduce the compensation to be paid such employees, based upon average monthly earnings during the twelve-month period immediately preceding the furlough or other termination of employment or reduction to a lower paying position;

c. The arbitration tribunal be expressly directed by the Board to utilize the provisions of the Burlington Formula in ascertaining the amount of compensation due an employee found to be adversely affected within the categories specified by the Board's Order.

2. That the Board grant such further hearing and reargument, including submission by the parties on brief and oral argument, as it considers essential to a proper development of the questions herein raised.

Respectfully submitted on behalf of the Brotherhood of Railway and Steamship Clerks by its Attorneys,

MULHOLLAND, ROBIE & HICKEY,

/s/ EDW. J. HICKEY, JR.

Dated: September 21, 1950.

Received September 21, 1950. [3239]

Before the Civil Aeronautics Board

September 20, 1950.

[Title of Cause.]

PETITION OF WESTERN AIR LINES, INC., FOR REHEARING, REARGUMENT AND RECONSIDERATION

Western Air Lines, Inc. (hereinafter referred to as "Western"), respectfully petitions for a rehearing, reargument and reconsideration of the Board's Opinion and Order, Serial No. E-4444, adopted July 7, 1950, in the reopened proceeding.

I.

Specification of Errors

1. The Board erred in finding that "some" Western employees were adversely affected by the transfer of Route 68.

2. The Board erred in attaching a condition precedent to the approval of the route sale three years after the sale [3247] of the route, and related equipment, was approved and the transfer completed pursuant to Board authority granted by its decision and order, Serial No. E-772, dated August 25, 1947.

3. The Board erred in ordering Western to submit to arbitration.

4. The Board erred in applying employee protective conditions in this case.

5. The Board erred in invoking the doctrine of estoppel against Western.

6. The Board erred in ignoring United and Western's motion to dismiss the Airline Mechanics Division, UAW-CIO, as a party to this proceeding for want of prosecution.

Received September 22, 1950. [3248]

United States of America
Civil Aeronautics Board
Docket No. 2839

Adopted by the Civil Aeronautics Board at its Office in Washington, D. C., on the 29th Day of December, 1950.

[Title of Cause.]

ORDER No. E-4987

The prior proceedings in this case are recited in our original opinion, United-Western Acquisition of Air Carrier Property, 8 C.A.B. 298 (1947), and in our recent opinion on reconsideration, Serial No. E-4444, decided July 7, 1950.

In the order of July 7, on the basis of the findings set forth in the accompanying opinion, we made our approval of the transfer by Western Air Lines, Inc., (Western) to United Air Lines, Inc., (United) of Route 68 and related physical properties contingent upon compliance by Western with conditions providing for compensation to employees of Western for monetary losses in certain categories sustained as a result of such transfer. The identity of the individual employees entitled to such compensation and the amount of the losses sustained by them are, under the provisions of the

order, to be determined by agreement between Western and the employees concerned, or failing such agreement, by arbitration.

The order of July 7 is now challenged by petitions for reconsideration filed by Western and the Brotherhood of Railway and Steamship Clerks.

Western argues for the first time in its petition for reconsideration that the Board has no power to attach conditions to an approval of a transaction after that transaction has been consummated. We held in our [3310] opinion of July 7 that Western could not be heard to make that argument here because the Board in declining to include in the original order of approval protective conditions for the benefit of adversely affected employees expressly relied on testimony by Western's president that no such adverse effect would be suffered. The record shows that such adverse effect was suffered. Nothing in the petition for reconsideration warrants abandonment or modification of this view.

Indeed, further consideration of the problem has led to the conclusion that in addition to the estoppel ground relied on in the July 7 opinion, there is another basis on which we are authorized to impose protective labor conditions in this case, even though the transaction between Western and United has been consummated.

Our order of approval was issued on August 25, 1947. The time to apply for reconsideration under Board regulations expired on September 24, 1947. A timely petition for reconsideration was filed by the Air Line Pilots Association (ALPA) on Sep-

tember 23. The fact that the parties had consummated the transaction on September 15 could not and did not deprive the Board of power to reconsider the approval granted in the original order and to attach further conditions or indeed even to revoke such approval. In consummating the transaction prior to the expiration of the time for filing petitions for reconsideration and prior to the Board's disposition of those petitions, the parties acted at their own risk.

For this reason we believe we could impose the burden of protective conditions on United as well as Western. United in going ahead with the transaction prior to the expiration of the time for filing petitions for reconsideration assumed the risk that the Board would impose protective conditions. However, we still do not think it fair or equitable to United to impose on it a burden which arises not out of any change of mind on our part but out of the fact that the other party to the agreement testified as to facts which United had every reason to believe were reliable but which have subsequently proved to be incorrect.

Western argues that there is no way in which the Board can enforce its order of July 7 and compel Western to comply with the conditions. But it seems to us that we have the same power in this case as in any other. Failure by Western to comply with the conditions of the July 7 order would render inoperative the approval heretofore granted under sections 401(i) and 408(b) to the transfer to United of Route 68 and related physical prop-

erties. By refusing to comply with the conditions, Western would, unless it could undo the transaction with United, be placing itself in violation of sections 401(i) and 408(b) and would be subject to all the penal and enforcement provisions of the Act applicable to such violation. The fact that Western might find it impractical to undo the transaction would not be a defense because the failure to impose conditions in the original order of approval was due to the Board's reliance on testimony by Western's president and because by consummating the transaction prior to the expiration of the time fixed for reconsideration, Western went ahead at its own risk. [3311]

The other grounds of Western's petition have been considered and disposed of in the July 7 opinion and the petition for reconsideration sets forth no new material to warrant a modification of our findings therein.

The Brotherhood of Railway and Steamship Clerks in its petition for reconsideration requests modification of our order so as to provide for a complete determination by the Board of the formula on the basis of which adversely affected employees are to be conpensated and a narrowing of the arbitrator's jurisdiction to a determination of specific claims.

Subsequent to the opinion of July 7, we had occasion in the North Atlantic Route Transfer Case (Supplemental Opinions dated September 22 and 25, 1950), to give extended consideration to the problem of what conditions should be imposed

for the protection of employees adversely affected by a route transfer or merger. In the light of that further consideration, we have re-examined the problem of protective conditions in this proceeding and have decided that it would be desirable to spell out definitely the basis on which adversely affected employees should be compensated and to leave to arbitration only the determination of individual claims.

In this connection, the principal problem is what should be the duration of the protective period during which monetary losses sustained as a result of the transfer of Route 68 and related physical properties to United should be recognized and compensated for. We think it clear that in no event should the period be longer than the period of time during which the employee was in the employ of Western prior to September 15, 1947, the date of consummation of the United-Western agreement. The Burlington Formula provides in addition that in no event should the protective period be longer than four years.

It seems to us that this four-year period, on the facts of this particular case, is too long. Although the record here does contain a sufficient showing of adverse effect to employees, it does not indicate that this adverse effect is likely to continue for any period of four years. It is true, of course, that if the harm does not last for four years, Western would not be liable therefor. But there would still be the burden and expense of litigating claims before an arbitration tribunal.

Accordingly, we have concluded that the maxi-

mum protective period should be something less than four years. Fixing any specific period is necessarily a matter of judgment, but it seems to us on the basis of the record before us that no appreciable harm is likely to have been sustained beyond a period of two years and that conversely a period of two years would not be an undue burden on Western. We have therefore provided that the protective period should not extend beyond September 15, 1949, a date two years subsequent to the consummation of the United-Western [3312] agreement. We wish to emphasize that we are not by this determination foreclosing the possibility that we will in the future adopt the four-year period of the Burlington Formula or some other period. A different record or a different set of general economic conditions might well persuade us that this provision of the Burlington Formula was a reasonable one.

We have also made clear in this order the manner in which compensation for loss of salary shall be determined and the setoffs which shall be taken into account. In connection with the matter of moving expenses, we have specified also what should be included in this category.

The disposition of the matter has made it necessary to rewrite paragraph 6 of the prior order. The second clause of that paragraph contained provisions with respect to claims for losses incurred subsequent to the date of the arbitration award. Since under the amendment contained in this order the protective period will not extend beyond Sep-

tember 15, 1949, this clause is no longer appropriate. Accordingly, it has been deleted.

The Air Line Pilots Association has filed, pursuant to paragraph 5 of our order, a motion requesting the Board to prescribe a method of selecting an arbitrator as well as the rule for the conduct of the arbitration. The motion discloses that Western's refusal to discuss these questions with ALPA has been based on the fact that it planned to file a petition for reconsideration. In view of this we will defer action on ALPA's motion until the labor organizations have had another opportunity to attempt to work out an agreement with Western on the method of selecting an arbitration tribunal and on the rules for the conduct of the arbitration.

We have also amended paragraph 7 of the order to make it clear that employees who entered the employ of Western subsequent to the consummation of the agreement with United are not entitled to recover any compensation under this order. Such employees obviously took their chances with the company as it stood at the time of their employment. We have also made it clear in amended paragraph 7 that employees who had not worked with Western for more than three months prior to sustaining a monetary loss as a result of the United-Western contract are not entitled to recovery. In view of the fact that the protective period as to such employees would be three months or less the amount of their claims would obviously be small and we do not think the arbitration tribunal should be burdened with them. Finally, we

have preserved the $6500 limitation in former paragraph 7 but have followed the precedent in the North Atlantic Route Transfer Case (Order Serial No. E-4634, par. 17) and have excepted from the limitation meteorologists as well as flight personnel and dispatchers.

Accordingly, we find that it would be just and reasonable and in the public interest to impose the conditions set forth in Order Serial No. E-4444, as amended in the manner specified below. [3313]

It Is Therefore Ordered That:

1. Order Serial No. E-4444 be and it hereby is amended to include the following paragraph 1-A:

> 1-A. The amount of compensation for loss of salary for an employee of Western attributable to furlough or termination of employment shall be for each month of the protective period the average monthly compensation of such employee prior to furlough or termination of employment less the amount of earnings in other positions and the amount of unemployment insurance received by such employee during such month; however, no compensation shall be paid to any employee for any month (i) subsequent to the time when it appears that such employee failed to use reasonable diligence in locating and accepting other employment, the duties of which he was qualified to perform, or (ii) subsequent to the time when such employee failed without good cause to return to service after being notified by Western of a position, the duties of which he was qualified

to perform and for which he was eligible, or (iii) subsequent to the time of such employee's resignation, death, retirement on pension, or dismissal for good cause related to the individual conduct of such employee;

The amount of compensation for loss of salary for an employee of Western attributable to reduction to a lower paying position shall be for each month of the protective period a sum equal to the difference between the average monthly compensation of such employee prior to such reduction and the monthly compensation of such employee in the lower paying position in that month; this sum shall be reduced by an allowance for time lost during such month on account of voluntary absence at the rate of compensation applicable prior to reduction and shall be increased by an allowance for time worked during such month in excess of the average monthly time worked prior to reduction at the rate of compensation of the lower paying position; however, if any such employee has elected not to exercise his seniority rights, he shall not for any month subsequent to his failure to exercise such rights be entitled to any compensation;

The amount of compensation to a Western employee for moving expenses shall include the expenses of moving his household and other personal effects and the traveling expenses of the employee and his immediate family; [3314]

As used in the paragraph 1A:

The words "protective period" mean the period commencing with the date on which the employee was furloughed or terminated or reduced to a lower paying position and continuing for a length of time equal to that during which the employee was in the employ of Western prior to September 15, 1947, provided that in no event shall the protective period continue beyond September 15, 1949;

The words "average monthly compensation" mean the amount arrived at by dividing by twelve the total compensation received by an employee from Western in the last twelve months preceding the time of his furlough or termination or his reduction to a lower paying position during which he earned compensation; in the case of an employee who has worked less than twelve months for Western preceding the time of his furlough or termination or his reduction to a lower paying position, the words "average monthly compensation" shall mean the amount arrived at by dividing the total compensation received by such employee from Western preceding the time of his furlough or termination or his reduction to a lower paying position by the number of months during which compensation was earned by such employee prior to such furlough or termination or reduction to a lower paying position by the number of months during which compensation was earned by such em-

ployee prior to such furlough or termination or reduction to a lower paying position;

The words "average monthly time worked prior to reduction" mean the amount of time arrived at by dividing by twelve the total amount of time for which an employee was paid by Western in the last twelve months preceding the time of his reduction to a lower paying position during which he earned compensation; in the case of an employee who has worked less than twelve months for Western preceding the time of his reduction to a lower paying position the words "average monthly time worked" shall mean the amount of time arrived at by dividing the total amount of time for which such employee has been paid by Western preceding the time of his reduction to a lower paying position by the number of months during which compensation was earned by such employee prior to such reduction to a lower paying position;

2. Order Serial No. E-4444 be and it hereby is further amended to delete present paragraph 6 and insert the following new paragraph 6:

6. Claims on behalf of the employees for monetary losses in the categories described in paragraph 1 (b) above as a result of the transfer of Route 68 and related physical properties alleged to have been sustained prior to the conduct of the hearing by the arbitration tribunal shall be filed with the arbitration tribunal in such form and within such time as

that tribunal shall fix; failure to file a request for arbitration pursuant to [3315] paragraph 2 of this order shall not preclude the filing of a claim on behalf of an employee with an arbitration tribunal subsequently established at the request of other labor organizations or employees;

3. Order Serial No. E-4444 be and it hereby is further amended to delete present paragraph 7 and insert the following new paragraph 7:

7. The arbitration tribunal shall not entertain a claim on behalf of an employee who (i) had not been in the employ of Western at a time prior to September 15, 1947, or (ii) had not at some time prior to furlough or termination or reduction to a lower paying position been in the employ of Western for a period of at least three months, or (iii) at the time the alleged monetary loss was sustained was receiving from Western compensation at a rate in excess of $6500 per annum provided that this last limitation shall not apply to flight personnel, meteorologists, or dispatchers;

4. The petitions for reconsideration of Western and the Brotherhood be and they hereby are in all other respects denied.

By the Civil Aeronautics Board:

[Seal] /s/ M. C. MULLIGAN,
Secretary.

Served December 29, 1950. [3316]

[Endorsed]: No. 12867. United States Court of Appeals for the Ninth Circuit. Western Air Lines, Inc., Petitioner, vs. Civil Aeronautics Board, Respondent. Transcript of the Record. Petition for Review of Orders of the Civil Aeronautics Board. Filed March 30, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12867

WESTERN AIR LINES, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent.

CERTIFICATION OF TRANSCRIPT OF RECORD

It Is Hereby Certified that, subject to the exceptions noted below, the annexed materials numbered from page 1 to page 3316, inclusive, constitute a true copy of the record upon which were entered the Board's Orders Serial Nos. E-4444, dated July 7, 1950, and E-4987, dated December 29, 1950, to-

gether with briefs, transcripts of arguments and certain memoranda and correspondence in the nature of briefs and arguments, which latter materials were considered by the Board insofar as based on evidence contained in the record, or on facts and circumstances entitled to official notice, in connection with the entry of the orders described.

By stipulations of the parties contained in the transcript of the record certified herewith certain publications and records were incorporated into such record by reference thereto. Since the extent to which the data contained in such publications and records were urged to and considered by the Board is clearly apparent from other documents, briefs and argument, and the Board's decisions and opinions so certified, the furnishing of such publications and reports for use by the Court is believed to be unnecessary, and copies of such materials have not been included in the transcript certified herewith. Copies of such publications or records, or parts thereof, however, as may be determined necessary for the purpose of review will promptly be furnished upon request.

By the Civil Aeronautics Board:

[Seal] /s/ M. C. MULLIGAN,
Secretary.

Washington, D. C., March 22, 1951.

[Endorsed]: Filed March 31, 1950.

[Title of Court of Appeals and Cause.]

PETITION OF WESTERN AIR LINES FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Western Air Lines, Inc., Petitioner (subsequently to be referred to as Western in the interests of conciseness), presents this petition for review of and to set aside an order of the Civil Aeronautics Board (subsequently to be referred to as the Board) dated July 7, 1950, Serial No. E-4444, and an order dated December 29, 1950, Serial No. E-4987, to the extent so far as the orders amend or make subject to additional terms and conditions an order of the Board dated August 25, 1947, Serial No. E-772.

I.

Summary of the Board's Actions

On March 7, 1947, Western filed an application under Sections 401, 408, and 412 of the Civil Aeronautics Act requesting approval of an agreement between Western and United Air Lines, Inc., (subsequently to be referred to as United), providing for the transfer by Western to United of the Certificate of Public Convenience and Necessity held by Western for Route No. 68, between Los Angeles and Denver, and the sale by Western to United of certain physical properties connected with that route and other allied matters.

On August 25, 1947, by its order Serial No. E-772 (8 CAB 298) the Board approved the agreement, and ordered that within twenty-one (21) days from that date an amended Certificate of Public Convenience and Necessity including Route 68 be issued to United.

On September 15, 1947—the date specified by the Board for the issuance to United of the amended Certificate of Public Convenience and Necessity—the transfer of the physical properties was effectuated and United commenced to operate the route without interruption of service.

Exactly one year after the Board's Order (E-772) approving the transaction, the Board by Order Serial No. E-1984, dated August 25, 1948, ordered the proceedings reopened to determine (1) whether any employees were adversely affected by the transfer and (2) what conditions, if any, for the protection of the employees adversely affected should be attached to the Board's order of approval. The order reopening the proceedings was made in response to a petition for reconsideration filed by the Air Line Pilots Association and the petition for leave to intervene and for reconsideration filed by the Air Line Mechanics Division, UAW-CIO, which petitions were both filed on September 24, 1947, nine days after the transfer from Western to United of the certificate and the physical properties.

Two years and eleven months subsequent to the Board's decision approving the transaction, the Board issued its Order dated July 21, 1950, (E-4444), imposing employee protective conditions

on the original order of approval (E-777) dated August 25, 1947. On December 29, 1950, by Order Serial No. E-4987 the Board denied Western's petition for reconsideration of Order No. E-4444 dated July 7, 1950.

II.

Issues for Review

The issues to be resolved by the Court under this petition for judicial review are:

(1) Did the Board commit legal error by imposing employee protective provisions two years and ten months after the date specified in its original approving order (E-772) as the date for the issuance of the amended Certificate of Public Convenience and Necessity to United.

(2) Did the Board commit legal error by imposing employee protective provisions as a condition of the approval of the agreement between United and Western in view of the fact that the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. 401, does not specifically provide for the imposition of such conditions.

(3) Did the Board commit legal error by imposing conditions modifying the original order (E-772) approving the transaction inasmuch as the Board did not purport to retain jurisdiction in that order.

(4) Did the Board commit legal error in delegating judicial power to an arbitrator.

(5) Did the Board commit legal error in imposing the onerous conditions subsequent only on Western, the transferror.

III.

Comment on Issues for Review

By its original order dated August 25, 1947, (E-772), the Board approved the contract between Western and United and approved the transfer of the physical properties involved. At the same time the Board ordered "that within twenty-one days of the date of this order" an amended Certificate of Public Convenience and Necessity be issued to United authorizing United to fly Route 68.

Pursuant to and in reliance on this order, the transfer of the properties was effectuated on September 15, 1947, the date set by the Board, and United undertook the operation of Route 68 which United is still operating. By its subsequent orders imposing employee protective conditions on the transaction the Board purported to impress conditions subsequent on a transfer that it had previously authorized rather than imposing conditions on its approval of a contemplated transfer. Nowhere in the Civil Aeronautics Act is such authority given to the board.

Section 401(i) of the Civil Aeronautics Act (49 U. S. Code U.S.C. 481(i)) provides "No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest." Section 408(b), (49 U. S. Code 488(b)) provides in part "* * * it [the Board] shall by order, approve such consolidation, merger, purchase * * * upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe." These sections,

which are the only basis for the Board's power to impose any type of a condition, can not be construed to authorize the imposition of conditions on a transaction after it has been approved and consummated.

The infliction of conditions subsequent almost three years after the consummation of the approved transaction would deny to Western its right to abandon the proposed transfer because of oppressive and unacceptable conditions precedent. Violence would be done to the basic principles of justice if an administrative agency were empowered to lead a party into an inextricable position and then impose untenable conditions subsequent purportedly bearing the label of conditions precedent.

The issues involved in this petition for review are of major concern to the airline transportation industry. If in fact the law was intended by Congress to cloak the Board with the almost limitless power it arrogated in the orders under review, the industry should be forewarned to the end that other air carriers may not be led unwittingly into a similar position.

The legal points at issue will be dealt with at length in petitioner's Brief in the manner and style permitted and required by Rule 20 of the rules of this Court.

IV.

Basis for Jurisdiction

This petition is filed pursuant to Section 1006 of the Civil Aeronautics Act of 1938, 52 Stat. 973, 1024, 49 U.S.C. 401, 646, and Section 10 of the

Administrative Procedure Act, 60 Stat. 237, 243; 5 U.S.C., 1001, 1009.

Section 1006 of the Civil Aeronautics Act provides in part that any order issued by the Board shall be subject to review by the Circuit Court of Appeals for the Circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

The principal place of business of petitioner is in the City of Los Angeles, State of California.

V.

Relief Requested

Petitioner requests relief under this petition for review in the form of an order of this Court:

(1) Directing that the order of the Board dated July 7, 1950, Serial No. E-4444, and the order dated December 29, 1950, Serial No. E-4987, be set aside in such manner as to eliminate any employee protective conditions modifying the original order approving the transaction Serial No. E-772, dated August 25, 1947, and;

(2) Awarding petitioner such other redress as the law and record may justify.

Respectfully submitted,

GUTHRIE, DARLING & SHATTUCK,

By /s/ HUGH W. DARLING,

Attorneys for

Western Air Lines, Inc.

February 22, 1951.

[Endorsed]: Filed February 23, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY ON PETITION FOR REVIEW

In response to Rule 19 (6) of the Rules of Practice of this Court, Petitioner declares that the points on which it intends to rely in support of its Petition for Review are:

I.

Respondent erred in imposing conditions for the benefit of employees of Petitioner claimed to have sustained certain types of monetary loss as a result of the voluntary transfer by Petitioner to United Air Lines, Inc., of the Certificate of Public Convenience and Necessity for Route No. 68 between Los Angeles and Denver, and the sale by Petitioner to United Air Lines, Inc., of certain properties connected with that route, the transfer and sale of which were unconditionally approved by Respondent and consummated [3328] under order of Respondent on September 15, 1947.

II.

Respondent erred in imposing sanctions against Petitioner in favor of existing or former employees of Petitioner.

III.

Respondent erred in imposing conditions subsequent, designated as conditions precedent, to its approval of the transfer by Petitioner of a Certificate of Public Convenience and Necessity and the sale of certain properties relating to the Certificate.

IV.

Respondent erred in imposing conditions to its approval of a voluntary transfer by Petitioner of a Certificate of Public Convenience and Necessity and the sale of related properties after the transfer and sale had been consummated and without ordering a rescission of the transfer and sale and the restoration of status quo.

V.

Respondent erred in imposing conditions to its approval of a voluntary transfer by Petitioner of a Certificate of Public Convenience and Necessity and the sale of related properties without affording Petitioner a reasonable, or any, opportunity to accept or reject the conditions.

VI.

Respondent erred in failing to issue its order of [3329] July 7, 1950, amending its order of August 25, 1947, with reasonable dispatch, as required by Section 9 (6) of the Administrative Procedure Act.

VII.

Respondent erred in submitting to arbitration, without the approval or acquiescence of Petitioner, judicial and quasi-judicial matters requiring the consideration and decision of Respondent.

VIII.

Respondent erred in imposing conditions to its approval of a transfer by Petitioner of a Certificate of Public Convenience and Necessity and related properties only against Petitioner, the transferor and vendor.

IX.

Respondent erred in ignoring the preponderance of the evidence in the record and in disregarding the legal rights of Petitioner.

April 17, 1951.

GUTHRIE, DARLING & SHATTUCK,

By /s/ HUGH W. DARLING,
Attorneys for Petitioner.

Affidavit of Service attached.

[Endorsed]: Filed April 18, 1951. [3330]

[Title of Court of Appeals and Cause.]

DESIGNATION BY PETITIONER OF THE PARTS OF THE RECORD WHICH ARE BELIEVED TO BE MATERIAL FOR CONSIDERATION ON REVIEW AND WHICH SHOULD BE INCLUDED IN THE PRINTED RECORD

In response to Rule 19 (6) of the Rules of Practice of this Court, Petitioner designates those parts of the record which appear to be material to the consideration of the review and which should be included in the printed record as:

Description of Document	Pagination of Record on Review	Pagination of Original Document
Volume 1		
Application of Western Air Lines and United Air Lines for order approving sale of certain properties and transfer and amendment of a certificate of public convenience and necessity, filed March 7, 1947, excluding the itemized inventory attached to and marked Exhibit "A" to the agreement between Western and United, which agreement is Exhibit "A" to the application	Com. on 1	1–5 (1–4 Ex. A)
Petition for leave to intervene filed by Air Line Pilots Association	64–68	1–11
Report of prehearing conference, served March 27, 1947	124–136	1–5 (and App. A)
Portion of transcript of hearing of May 20–22, 1947, (pages 156–631 of record) consisting of the questions to and answers by Mr. T. C. Drinkwater, in Volume 1, commencing on line 12, page 106, thru line 20, page 110		106–110
Volume 2		
Question and answer No. 8 in the exhibit submitted by Petitioner marked "WT-1," commencing on line 17, page 10, to the end of the page		10

Description of Document	Pagination of Record on Review	Pagination of Original Document
Volume 3		
Order E-598, dated June 6, 1947, granting petitions of Western and United for initial decision by the Board	1256–1259	1–2
Volume 4		
Opinion and Order E-772, dated August 25, 1947	1739–1843	i–iii and 1–43 plus App. A and attached orders.
Orders dated September 11, 1947, correcting error in Order E-772 (E-792) and reissuing United Air Lines' certificate for Route No. 1 (E-793)	1911–1919	1–2 1–2 plus attached certificate.
Petition of Air Line Pilots Association for reconsideration of Order E-772	1920–1937	1–16 plus attachment.
Petitions of Airline Mechanics Division, UAW-CIO, for (1) leave to intervene and (2) reconsideration of Order E-772	1939–1949	1–6 plus verification and Exhibit "A."
Petition of Brotherhood of Railway and Steamship Clerks for permission to file out of order a request for reconsideration of Order E-772	1981–1986	1–5
Order E-1894, dated August 25, 1947, dealing with the petitions of labor organizations for reconsideration, intervention and stay of Order E-772.	1987–1991	1–4
Transcript of reopened hearing, November 14–15, 1949	2027–2361	465–792

Description of Document	Pagination of Record on Review	Pagination of Original Document
Volume 5		
Transcript of reopened hearing, November 16–17, 1949	2362–2551	793–978
Volume 6		
Opinion and Order E-4444, dated July 7, 1950	3191–3217	1–22 and attached order.
Volume 7		
Order E-4987, dated December 29, 1950	3309–3316	1–7
Petition of Western Air Lines for review of orders of the Civil Aeronautics Board in this proceeding		1–8
Petitioner's statement of points on which it intends to rely in support of its Petition for Review		1–3
This designation of those parts of the record which appear to be material to the consideration of the review		1–4

April 17, 1951.

GUTHRIE, DARLING &
SHATTUCK,
By /s/ HUGH W. DARLING,
Attorneys for Petitioner.

Affidavit of Service attached.

[Endorsed]: Filed April 18, 1951.

[Title of Court of Appeals and Cause.]

ORDER

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, acting on their own behalf and on behalf of certain employees of the above-named petitioner, has moved for leave to intervene and to become a party respondent in the above-entitled proceedings.

It appears from the record filed here with the Petition for Review of the Board's Order that the Brotherhood was permitted to intervene and become a party to the proceedings before the Board. It would appear therefore that upon this petition for a review of those proceedings the Brotherhood is a party and is entitled to be heard in this Court. As we regard the making of the present Motion unnecessary for that purpose, the Motion is denied.

HOMER T. BONE,

WILLIAM E. ORR,

WALTER L. POPE,

Circuit Judges.

[Endorsed]: Filed April 23, 1951.

United States Court of Appeals
for the Ninth Circuit

No. 12,867

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

May 25, 1951

Before: Bone, Orr and Pope,
Circuit Judges.

Pope, Circuit Judge.

OPINION UPON MOTION FOR LEAVE TO INTERVENE

On April 23, 1951, this court made an order upon the motion of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, for leave to intervene herein. In that order the court noted that the Brotherhood was permitted to intervene and become a party to the proceedings before the Board, and found that the Brotherhood is a party and is entitled to be heard in this court upon the pending petition for a review of the Board's proceedings. Accordingly, motion for leave to intervene was denied as unnecessary.

It has now been suggested that although neither the petitioner nor the Board has interposed any objection to the Brotherhood being heard in this

court or in these proceedings, yet the Board is fearful lest the form in which the court's order was made should be taken to establish as a rule of procedure that anyone permitted to intervene in a similar proceeding before the Board, would by virtue of that fact necessarily be entitled to recognition as a party to any proceeding to review an order issued by the Board, and even be deemed entitled to petition for review.

Necessarily the court's previous order had reference solely to the facts of this particular matter in which it was apparent that the Brotherhood had a substantial interest in the order here under review. The order of this court was made in the light of the fact and was not intended to establish a rule of practice or procedure in subsequent matters in this court.

We think that the suggestion that it would have been better to grant the Brotherhood's motion to intervene involves a mere question of appropriate nomenclature. Ordinarily intervention in a proceeding is sought only by one who has not theretofore been a party. "An 'intervention' is a proceeding by one not theretofore a party." Ex Parte Green, 221 Ala. 415, 129 So. 69. For this reason intervention in an appellate court is inappropriate. Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co. (2 cir.), 292 F. 861; The William Bagaley, 5 Wall. 377, 411-412.

Because the proceedings before us are limited to a review of the action of the Board, we would consider it inappropriate to permit one who had

not been a party to the proceeding before the Board to intervene here for the first time and to make arguments or press points which it had not previously presented to the Board. Cf. Willipoint Oyster v. Ewing (9 cir.), 174 F. 2d 676, 692.

Of course it would be in order for the Brotherhood to make application for leave to file a brief or otherwise be heard as amicus curiae. But we understand that the Brotherhood seeks more than that. What it desires is to be recognized as a party to these review proceedings. Under the provisions of Title 5 USCA § 1009(e), the court is charged with reveiwing such portions of the record "as may be cited by any party." The Brotherhood seeks to be recognized as such a party.

Title 5 § 1001(b), after defining a "party" to an administrative proceeding, provides "but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes." Our attention has now been called to the fact that the Civil Aeronautics Board has done just that by their Rules of Practice § 302.6 (b) (3), which provides that: "Interventions provided in this section are for administrative purposes, and no decision to grant leave to intervene shall be deemed to constitute a finding or determination that the intervening party has such a substantial interest in the order that is to be entered in that proceeding as will entitle it to demand court review of such order."

The court considers the petition for "intervention," so called, to be in substance a petition on the

part of the Brotherhood to be recognized as a party entitled to be heard in this proceeding. Because it appears to the court that the Brotherhood was admitted as a party to the proceedings before the Board and presented its claims there, that the Brotherhood has a substantial interest in the proceeding, and that it is entitled to be heard herein, the Brotherhood will be so recognized.

[Endorsed]: Opinion upon Motion to Intervene. Filed May 25, 1951. Paul P. O'Brien, Clerk.

Orders
Serial Number E-792

United States of America, Civil Aeronautics Board
Washington, D. C.

Docket No. 2839

Adopted by the Civil Aeronautics Board at Its Office in Washington, D. C., on the 11th Day of September, 1947.

In the Matter of:

The Application of WESTERN AIR LINES, INC., and UNITED AIR LINES, INC., Under Sections 401, 408 and 412 of the Civil Aeronautics Act of 1938, as Amended, for an Order Approving an Agreement for the Sale of Certain Properties and the Transfer and Amendment of a Certificate of Public Convenience and Necessity

ORDER AMENDING ORDER

A full public hearing having been held in the above-entitled proceeding;

The Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, and in accordance with said opinion having issued its Order, Serial Number E-772, dated August 25, 1947, as amended by Order Serial No. E-786, dated September 10, 1947, and

The Board finding that paragraph 3 of said Order Serial No. E-772, as amended, inadvertently re-

ferred to the amended certificate of public convenience and necessity for Route No. 1 issued to United Air Lines, Inc., pursuant to Order Serial No. E-556, dated May 19, 1947, rather than to the currently effective amended certificate for Route No. 1; and that since the adoption of Order Serial No. E-772 the Board, by Order Serial No. E-783, dated September 3, 1947, in the Great Lakes Area Case, Docket No. 535, et al., authorized the issuance of an amended certificate of public convenience and necessity to United Air Lines, Inc., for Route No. 1;

It Is Ordered: That paragraph numbered "3" of Order Serial No. E-772, dated August 25, 1947, as amended, be further amended in its entirety to read as follows:

"3. Within twenty-one days of the date of this order, the amended certificate of public convenience and necessity of United Air Lines, Inc., then currently in effect for Route No. 1 shall be further amended to authorize the holder to engage in air transportation with respect to persons, property and mail between the terminal point Los Angeles, Calif.; the intermediate points Las Vegas, Nev.; Grand Junction, Colo.; Denver, Colo.; North Platte, Nebr.; Grand Island, Nebr.; Lincoln, Nebr.; Omaha, Nebr.; Des Moines, Iowa; Cedar Rapids, Iowa; Iowa City, Iowa; Moline, Ill.; Milwaukee, Wisc.; Chicago, Ill.; South Bend, Ind.; Fort Wayne, Ind.; Toledo, Ohio, and (a) beyond Toledo, Ohio, the intermediate points Detroit, Mich.; Sandusky, Ohio; Cleveland, Ohio; Akron, Ohio; Youngstown, Ohio; Allentown, Pa.; Philadelphia, Pa., and the co-

terminal points New York, N. Y., and Newark, N. J., and (b) beyond Toledo, Ohio, the intermediate points Detroit, Mich.; Sandusky, Ohio; Cleveland, Ohio; Hartford, Conn., and the terminal point Boston, Mass., and (c) beyond Toledo, Ohio, the terminal point Washington, D. C. (said authorization as to Sandusky, Ohio, to expire on September 4, 1950, at 12:01 a.m.); subject to the terms, conditions, and limitations contained in said currently effective amended certificate and to a further restriction prohibiting United Air Lines, Inc., from engaging in local air transportation between Los Angeles, Calif., and Las Vegas, Nev.; and"

By the Civil Aeronautics Board:

[Seal] /s/ M. C. MULLIGAN,

M. C. MULLIGAN,
Secretary.

[Title of Board and Cause.]

SUPPLEMENTAL ORDER

Pursuant to Order Serial No. E-772, dated August 25, 1947, as amended, by Order Serial Nos. E-786 and E-792, dated September 10, 1947, and September 11, 1947, respectively;

It Is Ordered:

1. That effective September 15, 1947, at 12:01 a.m., Pacific Coast Standard Time, the certificate of public convenience and necessity for Route No. 68 issued to Western Air Lines, Inc., pursuant to

Order Serial No. 3263, dated November 11, 1944, be and it is hereby cancelled;

2. That the certificate of public convenience and necessity for Route No. 1 issued to United Air Lines, Inc., pursuant to Order Serial No. E-783, dated September 3, 1947, be amended and issued in the form attached hereto;

3. That said amended certificate shall be signed on behalf of the Board by its Chairman, shall have affixed thereto the seal of the Board attested by the Secretary, and shall be effective on September 15, 1947, at 12:01 a.m., Pacific Coast Standard Time.

4. As of 12:01 a.m., Pacific Coast Standard Time, all authorizations by the Board then in effect to render scheduled nonstop service between points on Route No. 68 and all authorizations by the Board then in effect to serve regularly any point on Route No. 68 through an airport convenient thereto shall be deemed to be transferred to United Air Lines, Inc.

By the Civil Aeronautics Board:

[Seal] /s/ M. C. MULLIGAN,

M. C. MULLIGAN,
Secretary.

United States of America, Civil Aeronautics Board
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

(As Amended)

United Air Lines, Inc.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

(1) Between the terminal point Seattle, Wash.; the intermediate points Tacoma, Wash.; Portland, Oreg.; The Dalles, Oreg.; Pendleton, Oreg.; Boise, Idaho; Twin Falls, Idaho; Salt Lake City, Utah; Ogden, Utah; Rock Springs, Wyo.; Cheyenne, Wyo.; Denver, Colo.; North Platte, Nebr.; Grand Island, Nebr.; Lincoln, Nebr.; Omaha, Nebr.; Des Moines, Iowa; Cedar Rapids, Iowa; Iowa City, Iowa; Moline, Ill.; Milwaukee, Wisc.; Chicago, Ill.; South Bend, Ind.; Fort Wayne, Ind.; Toledo, Ohio, and (a) beyond Toledo, Ohio, the intermediate points Detroit, Mich.; Sandusky, Ohio; Cleveland, Ohio; Akron, Ohio; Youngstown, Ohio; Allentown, Pa.; Philadelphia, Pa., and the co-terminal points New York, N. Y., and Newark, N. J., and (b) beyond Toledo, Ohio, the intermediate points Sandusky, Ohio; Cleveland, Ohio; Hartford, Conn., and the terminal point Boston, Mass., and (c) beyond

Toledo, Ohio, the terminal point Washington, D. C. (said authorization as to Sandusky, Ohio, to expire on September 4, 1950, at 12:01 a.m.);

(2) Between the intermediate point Pendleton, Oreg.; the intermediate point Walla Walla, Wash., and the terminal point Spokane, Wash.;

(3) Between the intermediate point Pendleton, Oreg., and the terminal point Seattle, Wash.;

(4) Between the intermediate points Boise, Idaho; Reno, Nev., and Sacramento, Calif., and the terminal point San Francisco, Calif.;

(5) Between the terminal point Oakland, Calif.; the intermediate points San Francisco, Calif.; Sacramento, Calif.; Reno, Nev.; Elko, Nev.; Salt Lake City, Utah; Ogden, Utah; Rock Springs, Wyo.; Cheyenne, Wyo.; Denver, Colo.; North Platte, Nebr.; Grand Island, Nebr.; Lincoln, Nebr.; Omaha, Nebr.; Des Moines, Iowa; Cedar Rapids, Iowa; Iowa City, Iowa; Moline, Ill.; Milwaukee, Wisc.; Chicago, Ill.; South Bend, Ind.; Fort Wayne, Ind.; Toledo, Ohio, and (a) beyond Toledo, Ohio, the intermediate points Detroit, Mich.; Sandusky, Ohio; Cleveland, Ohio; Akron, Ohio; Youngstown, Ohio; Allentown, Pa.; Philadelphia, Pa., and the coterminal points New York, N. Y., and Newark, N. J., and (b) beyond Toledo, Ohio, the intermediate points Detroit, Mich.; Sandusky, Ohio; Cleveland, Ohio; Hartford, Conn., and the terminal point Boston, Mass., and (c) beyond Toledo, Ohio, the terminal point Washington, D. C. (said authorization as to Sandusky, Ohio, to expire on September 4, 1950, at 12:01 a.m.);

(6) Between the terminal point Los Angeles, Calif.; the intermediate points Las Vegas, Nev.; Grand Junction, Colo.; Denver, Colo.; North Platte, Nebr.; Grand Island, Nebr.; Lincoln, Nebr.; Omaha, Nebr.; Des Moines, Iowa; Cedar Rapids, Iowa; Iowa City, Iowa; Moline, Ill.; Milwaukee, Wisc.; Chicago, Ill.; South Bend, Ind.; Fort Wayne, Ind.; Toledo, Ohio, and (a) beyond Toledo, Ohio, the intermediate points Detroit, Mich.; Sandusky, Ohio; Cleveland, Ohio; Akron, Ohio; Youngstown, Ohio; Allentown, Pa.; Philadelphia, Pa., and the coterminal points New York, N. Y., and Newark, N. J., and (b) beyond Toledo, Ohio, the intermediate points Detroit, Mich.; Sandusky, Ohio; Cleveland, Ohio; Hartford, Conn., and the terminal point Boston, Mass., and (c) beyond Toledo, Ohio, the terminal point Washington, D. C. (said authorization as to Sandusky, Ohio, to expire on September 4, 1950, at 12:01 a.m.);

(7) Between the terminal point Seattle, Wash.; the intermediate points Tacoma, Wash.; Portland, Oreg.; Salem, Oreg.; Eugene, Oreg.; Bend, Oreg.; Medford, Oreg.; Eureka, Calif.; Klamath Falls, Oreg.; Red Bluff, Calif.; Sacramento, Calif.; Oakland, Calif.; San Francisco, Calif.; Stockton, Calif.; Modesto, Calif.; Merced, Calif.; Salinas, Calif.; Monterey, Calif.; Fresno, Calif.; Visalia, Calif.; Bakersfield, Calif.; Santa Barbara, Calif.; Los Angeles, Calif.; Long Beach, Calif., and the terminal point San Diego, Calif.,

to be known as Route No. 1.

The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the date of issuance of this certificate, as amended; and may continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points on the date of issuance of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein, through any airport convenient thereto, and render scheduled nonstop service between any two points not consecutively named herein between which service is authorized hereby.

(3) The holder shall not be authorized to regularly schedule nonstop service between Twin Falls, Idaho; Boise, Idaho; Pendleton, Oreg.; The Dalles, Oreg.; Portland, Oreg.; Tacoma, Wash.; Seattle, Wash.; Walla Walla, Wash., or Spokane, Wash., as one of the two points between which such service

is rendered, and points east of Salt Lake City, Utah, as the other of the two points between which such service is rendered, except between Twin Falls, Idaho, or Boise, Idaho, and either Cheyenne, Wyo.; Denver, Colo., or Rock Springs, Wyo.

(4) The holder shall not service Milwaukee, Wisc., on flights serving Chicago, Ill.; Detroit, Mich., or Washington, D. C.

(5) The holder shall serve Milwaukee, Wisc., only on flights originating at Omaha, Nebr., or a point west thereof, and terminating at Cleveland, Ohio, or a point east thereof, or originating at Cleveland, Ohio, or a point east thereof, and terminating at Omaha, Nebr., or a point west thereof.

(6) The holder shall serve at least one intermediate point east of Milwaukee, Wisc., on all flights serving Milwaukee, Wisc., and New York, N. Y., or Milwaukee, Wisc., and Newark, N. J.

(7) The holder shall serve Detroit, Mich., only on flights originating at Denver, Colo., or a point west thereof, and terminating at New York, N. Y., or originating at New York, N. Y., and terminating at Denver, Colo., or a point west thereof.

(8) The holder shall not serve Detroit, Mich., and Cleveland, Ohio, by the same flight.

(9) The holder shall render scheduled nonstop service between Chicago, Ill., and Washington, D. C., and between Chicago, Ill., and Boston, Mass., only on flights originating or terminating at Omaha, Nebr., or a point west thereof.

(10) The holder shall not serve Klamath Falls, Oreg., and Medford, Oreg., by the same flight.

(11) The holder shall not serve Bend, Oreg., and Eugene, Oreg., by the same flight.

(12) The holder shall not serve Fort Wayne, Ind., on flights serving Detroit, Mich., or Toledo, Ohio.

(13) The holder shall not engage in local air transportation between Las Vegas, Nev., and Los Angeles, Calif.

(14) In the operation of any nonstop flight authorized herein, the holder shall not make operational stops, unless caused by an emergency or considerations of safety arising during such flight, at any point not named between the two terminals of such flight in a certificate of public convenience and necessity of the holder.

The exercise of the privileges granted by this certificate, as amended, shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective on the 15th day of September, 1947, at 12:01 a.m., Pacific Coast Standard Time.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman and the seal of the Board to

be affixed hereto, attested by the Secretary of the Board, on the 11th day of September, 1947.

[Seal] /s/ OSWALD RYAN,
Acting Chairman.

Attest:

/s/ M. C. MULLIGAN,
Secretary.

Docket No. 2839

PROOF OF SERVICE

Order No. E-792—Order Amending Order
Order No. E-793—Supplemental Order

I hereby certify that on Sept. 12, 1947, that this document was sent to the following:

Registered:

Western Air Lines, Inc.; Att.: Paul E. Sullivan, 6060 Avion Drive, Los Angeles, Calif.

United Air Lines, Inc.; Att.: S. P. Martin, 5959 S. Cicero Ave., Chicago 38, Ill.

Regular:

Hugh W. Darling, 737 Pacific Mutual Bldg., Los Angeles, Calif.

Leslie Craven, Willkie, Owen, etc., 15 Broad St., New York, N. Y.

Paul M. Godehn, Mayer, Meyer, etc., 231 S. La Salle St., Chicago, Ill.

J. Francis Reilly, 726 Jackson Place, N. W., Wash., D. C.

John T. Lorch, Mayer, Meyer, etc., 231 S. La Salle St., Chicago, Ill.

Research Dept., c/o United Air Lines, Inc., 5959 S. Cicero Ave., Chicago 59, Ill.

Special Messenger:

Burgess—POD.

Delany—POD.

Bulletin Board.

Docket Section.

Stough.

Leasure.

Examiner: Wrenn B-101.

Public Counsel: Highsaw B-38, Kennedy B-38.

/s/ C.F.W.,

Chief, Docket Section.

No. 12867

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN AIR LINES INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

BRIEF OF PETITIONER, WESTERN AIR LINES, INC.

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No. 12867

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN AIR LINES INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

BRIEF OF PETITIONER, WESTERN AIR LINES, INC.

Basis of Jurisdiction.

1. Jurisdiction of Civil Aeronautics Board.

Under Sections 401, 408 and 412 of the Civil Aeronautics Act, as amended (49 U. S. C. 481, 488 and 499; 52 Stat. 987, 1001 and 1004) Western Air Lines, Inc., jointly with United Air Lines, Inc., filed an application on March 7, 1947, requesting approval of a written contract between Western and United, dated March 6, 1947, providing for the transfer by Western to United of the certificate of public convenience and necessity held by Western for Airmail Route Number 68 between Los Angeles and Denver, and for the sale by Western to United of certain properties connected with the route. The jurisdiction of the Civil Aeronautics Board is stated in the Sections cited, copies of the pertinent portions of which are set forth in the appendix.

2. Jurisdiction of This Court.

Western's petition for a review of the orders of the Civil Aeronautics Board by which Western has been aggrieved was filed under Section 1006 of the Civil Aeronautics Act (49 U. S. C. 646; 52 Stat. 1024) and Section 10 of the Administrative Procedure Act (5 U. S. C. 1009; 60 Stat. 243). Each of these statutes provides for judicial review of the agency action. Section 1006 of the Civil Aeronautics Act recites that the petition for review shall be filed in the court for the circuit where the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia. Petitioner's principal place of business is, and since its incorporation has been, in Los Angeles, California.

Statement of the Case.

The essence of this case is that under appropriate sections of the Civil Aeronautics Act the Civil Aeronautics Board without reservation of jurisdiction and unconditionally,[1] approved the transfer from Western to United of an air route certificate and certain properties used on the route in accordance with the provisions of a written contract between Western and United. Supplemental to the approving order the Board on September 11, 1947, issued an order, effective September 15, 1947, at 12:01 A. M. Pacific Coast Standard time, cancelling Western's certificate for Route Number 68 and amending United's certificate for Route Number 1 to include Western's

[1]Except that United should charge to its surplus account a portion of the purchase price, a matter which is not at issue.

Route 68. The instant that order became effective it would have been illegal for Western to operate and illegal for United not to operate over the route. After this supplemental order became effective a petition for rehearing by the Board was filed by intervenors in the proceeding below.

Almost three years after Western's certificate for Route 68 had been "transferred" under compulsion of the Board's supplemental order effective on September 15, 1947, the Board issued a decision in the reopened proceeding purporting to approve the transfer (which long since had been consummated) on condition that Western would compensate its affected employees for monetary losses sustained in consequence of the transfer. The amount of the monetary burden imposed upon Western by this supplemental *ex post facto* order was not stated and Western was given no opportunity of electing to accept or reject the original approving order as subsequently conditioned.

In the interests of chronological clarity the events pertinent to the case will be abstracted in order of occurrence.

March 6, 1947. Western and United executed a written agreement setting forth contractual provisions for the transfer by Western to United of the certificate for Airmail Route Number 68 between Los Angeles and Denver and certain related personal property. [I, R. 9-13.]

March 7, 1947. Western and United jointly filed an application with the Board for approval of the agreement concerning the transfer of Route 68. [I, R. 3-13.]

May 20-22, 1947. The hearing on the application was held in Washington before Examiner Thomas L. Wrenn with appearances being made, among others, on behalf of the Air Line Pilots Association and the Brotherhood of Railway Clerks. Oral testimony was taken and various written documents were received in evidence. [I, R. 3-56.]

June 6, 1947. Under Section 8(a) of the Administrative Procedure Act the Board ordered the examiner to certify the entire record up to the Board for initial decision and ordered that a recommended decision of the examiner and a tentative decision of the Board be omitted. [I, R. 58-60.]

August 25, 1947. The Board issued its original opinion and order approving without condition the agreement dated March 6, 1947, between Western and United and the transfer by Western to United of its certificate for Route Number 68, with the direction that within 21 days of the date of the order United's certificate for Route Number 1 "shall be further amended to authorize United Air Lines, Inc., to engage in air transportation" between Los Angeles and Denver. [I, R. 65-188.]

September 11, 1947. By a supplemental order Number E-793 the Board decreed:

That effective September 15, 1947, at 12:01 A. M. Pacific Coast Standard time, Western's certificate for Route Number 68 be cancelled;

That United's certificate for Route Number 1 be amended to include Los Angeles-Denver, effective from September 15, 1947, at 12:01 A. M. Pacific Coast Standard time; and

That as of 12:01 A. M. Pacific Coast Standard time all authorization to render service on Route Number 68 "shall be deemed to be transferred to United Air Lines, Inc." [II, R. 894-903.]

September 24, 1947. Thirty days after the original order and nine days after Western's certificate for Route Number 68 had been cancelled by the September 11, 1947, order and barely within the time permitted by Rule 285.11 of the Board's Rules of Practice, the Air Line Pilots Association filed a petition for reconsideration of the Board's original order requesting that the Board modify its decision "so as to require United Air Lines to take into its seniority list of pilots the pilots that were normally required to fly Route Number 68 as operated by Western Air Lines." [I, R. 192-214.]

September 25, 1947. The Airline Mechanics filed a petition for leave to intervene and a separate petition for reconsideration of the Board's original order. [I, R. 214-227.]

October 3, 1947. Eighteen days after the effective date of the Board's September 11, 1947, order cancelling Western's certificate for Route 68 and amending United's certificate for Route 1 to include Los Angeles-Denver, and eight days after it had filed petitions for leave to intervene and for reconsideration, the Airline Mechanics filed a petition with the Board for a stay of its original order of August 25, 1947, which order had been consummated on September 15, 1947, when Western discontinued and United started operations between Los Angeles and Denver. [I, R. 229-230.]

October 13, 1947. The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station

Employees filed with the Board a petition for permission to file out of order requests that the Board reconsider and modify its original order. [I, R. 240-245.]

August 25, 1948. Almost one year later, by its Order Number E-1894, the Board ordered the proceedings reopened to determine (i) whether any employees of Western had been adversely affected as a consequence of the transfer of Route 68, and (ii) "what *conditions,*[2] if any, for the protection of employees of Western Air Lines, Inc., who may have been adversely affected should be attached to the Board's approval of said transfer of Route 68 and certain physical properties granted in Order Serial Number E-772, dated August 25, 1947"; and ordered that the Brotherhood of Railway and Steamship Clerks and the Airline Mechanics be made parties to the proceeding and denied the motion of Airline Mechanics for a stay order. [I, R. 245-248.]

November 14-17, 1949. More than two years after Western had discontinued operations and United had commenced operations between Los Angeles and Denver, and more than one year after the Board had reopened the proceeding, a hearing in the reopened proceeding was held before Examiner Thomas L. Wrenn who was the same examiner who heard the original proceeding. Oral testimony and written documents were received in evidence. [I, R. 250-462; II, R. 463-805.]

July 7, 1950. Almost three years after cancelling Western's certificate for Route 68 and amending United's certificate for Route 1 the Board issued its decision and

[2]Emphasis in quoted material added throughout unless otherwise noted.

order (E-4444) declaring that the original order of August 25, 1947 (E-772), as amended, "be and it hereby is *made subject* to the following additional terms and conditions", under which Western was required to *submit to arbitration* the questions of (a) the identity of the individual Western employees who sustained monetary losses as a result of the transfer by Western to United of Route 68, and (b) the amount which each employee should be paid by Western to compensate for the monetary losses. The modifying order set up various directives with respect to arbitration, ending with a specific retention of jurisdiction, which was not included in the original order, for the purpose of modifying or clarifying any provisions of that order and for the purpose of imposing from time to time "such other or further terms and conditions as to the Board may seem just and reasonable." [II, R. 815-847.]

August 16, 1950. The Board issued its order granting Western until September 21, 1950, within which to file a petition for rehearing of the Board's order dated July 7, 1950, and denying Western's request for a stay order. [II, R. 850-851.]

September 21, 1950. The Brotherhood of Railway and Steamship Clerks filed a petition for rehearing of the Board's order dated July 7, 1950. [II, R. 854-859.]

September 22, 1950. Western filed a petition for rehearing of the Board's order dated July 7, 1950. [II, R. 860-1.]

December 29, 1950. More than three years and three months after Western had discontinued and United had commenced operations between Los Angeles and Denver the Board, by its Order Number E-4987, amended its

order dated July 7, 1950, by clarifying in some respects the general procedure set up for arbitration and by denying Western's petition for reconsideration. This brought to an end Western's efforts to obtain relief from the Board. [II, R. 861-872.]

February 23, 1951. Western filed with this court its petition for a review of the Board's Order Number E-4444 dated July 7, 1950, and its Order Number E-4987 dated December 29, 1950 "to the extent and so far as the orders amend or make subject to additional terms and conditions an order of the Board dated August 25, 1947, Serial Number E-772." [II, R. 875-880.]

Questions Involved.

1. Did the Board have the legal right to impose onerous conditions on its approval of the transfer of the certificate for Route 68 and related personal property approximately three years after the transfer had been consummated and under circumstances and at a time when Western had no choice of accepting or rejecting the approval as retroactively conditioned?

2. Did the Board have the right to compel Western to arbitrate a matter requiring judicial judgment?

3. Did the Board's procedural steps comply with the Administrative Procedure Act requiring a speedy determination of the rights of the parties involved?

4. Did the Board have the right to impose employee protective conditions on Western alone?

5. Did the Board have the right under the Civil Aeronautics Act, or otherwise, to impose employee protective

provisions as a condition to approval of the transfer of Route 68, with or without an opportunity to accept or reject the approval as conditioned.

Specification of Errors.

The errors which Western relies upon and which will be urged in support of its position on this review are that the Civil Aeronautics Board below erred:

1. In imposing *ex post facto* conditions to the approval of the transfer to United of Western's certificate for Route 68 almost three years after Western's right to operate under the certificate had been cancelled by an order of the Board, which delayed conditional approval did not allow Western the privilege of accepting or rejecting the approval as conditioned.

2. In ordering Western to submit to arbitration matters requiring the judicial judgment of the Board and in failing to provide a method of appealing the decision of the arbitrators to a higher tribunal.

3. In failing to accord Western a speedy determination of its rights and duties as required by the Administrative Procedure Act.

4. In imposing the *ex post facto* labor protective conditions on Western without requiring United, the other party to the contract, to share in the onerous conditions.

5. In imposing without statutory authority labor protective provisions as a condition to the approval of the transfer to United of Western's certificate for Route 68.

Summary of Argument.

1. Ex Post Facto Conditions to an Approval Are Illegal.

The Board had no statutory right to impose, and no legal justification for imposing, onerous conditions to its approval of the transfer to United of Western's certificate for Route 68 after the transfer had been consummated under compulsion of an order of the Board.

2. The Board Had No Legal Right to Force Western to Submit a Judicial Matter to Arbitration.

The Board had no statutory right to order, and no legal justification for ordering, Western to submit to arbitration which of its employees were adversely affected by the transfer to United of Western's certificate for Route 68 and the amount of money which Western would have to pay to each of its affected employees as compensation for the damage sustained. The illegality and unjustifiability of that provision is emphasized by the fact that Western would be denied any right of appeal from a determination of the arbitrators.

3. Western Was Denied a Speedy Determination of Its Rights and Duties as Required by the Administrative Procedure Act.

The Administrative Procedure Act provides that an administrative agency shall proceed with reasonable dispatch to conclude matters presented to it. Even though it were legally permissible for the Board to impose *ex post facto* condition to its approval of a transfer, the imposition of

the onerous conditions almost three years after the transfer had been consummated amounted to an unreasonable delay in concluding the matter before the Board under a petition for reconsideration.

4. The Board Abused Legal Principles in Imposing Conditions on Western Alone.

Assuming that the Board had a legal right to impose labor protective conditions on its approval *ab initio* and also assuming that those conditions could be imposed *ex post facto,* it was an abuse of judicial right and judicial discretion to impose the conditions on Western alone when United was a party to the contract and derived equal, if not greater, benefits from it.

5. The Board Had No Statutory or Judicial Authority to Impose Labor Protective Conditions.

The cases permitting, and the statutes requiring, labor protective conditions with respect to transactions involving railroads are not applicable to airlines. There is no applicable statute authorizing the Board to impose *ab initio,* let alone *ex post facto,* labor protective conditions to its approval of the transfer of a certificate for an air route, and the circumstances cloaking the growing air transportation industry do not justify resorting to administrative legislation.

ARGUMENT.

I.

Ex Post Facto Conditions to an Approval Are Illegal.

(a) Statutory and Factual Background.

Western adheres to the position, which will be argued briefly under point 5, that the Board has no statutory power and no judicial authorization to apply labor protective conditions, prospective or retroactive, to its approval of transactions which fall within the purview of Sections 401 or 408 of the Civil Aeronautics Act. But since the imposition of *ex post facto* conditions is so flagrantly illegal primary reliance for a reversal will be based on that point.

Section 401(i) of the Civil Aeronautics Act reads:

> "No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest."

Nothing is said about the imposition of any type of a condition. So long as the proposed transfer is consistent with the public interest it is the duty of the Board to approve it.

Assuming for the moment that the Board could say that absent a certain condition the transfer would not be consistent with the public interest and that accordingly the transfer will be approved only in the event a specified condition is fulfilled, it is perfectly manifest that that condition would have to be stated, and therefore prospective. It would not be legal under this section of the Act for the Board to approve a transfer as being consistent with the public interest and then some three years later, during

which time the public interest had been subserved by the transferee, to hold that the transfer would not be consistent with the public interest unless certain conditions were fulfilled.

Section 408(a)(2) of the Civil Aeronautics Act, which is printed in the appendix, provides that it shall be unlawful, unless approved by order of the Board, for any air carrier to purchase all or any substantial part of the properties of another air carrier.

Section 408(b) sets up the mechanism for obtaining the Board's approval and declares that unless after a hearing the Board finds that the purchase will not be consistent with the public interest it shall approve the purchase "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe."

Since Western's application to the Board was made under Section 408 as well as Sections 401 and 412 [I, R. 3] no question will be raised here as to the applicability of Section 408, although it could well be argued that Western's Route 68 and the related personal property did not constitute a substantial part of its property within the purview of that section. But whether or not applicable there can be no doubt that the terms and conditions which the Board might find to be just and reasonable must accompany the approval. The statute does not provide a legal means whereby the Board at a later date, even a week let alone three years, may change its mind and attach *ex post facto* conditions to a previously granted and consummated unconditional approval.

Although Western's application recited that it was presented under Section 412 it is so obvious that this section

was not, and is not, applicable to the transaction at issue that space will not be wasted in analyzing it. It may be noted in passing, however, that were Section 412 applicable, the points urged with respect to Sections 401 and 408 would fit equally well.

The transfer of an air route certificate from one air carrier to another is entirely *voluntary,* subject only to Board approval under Sections 401 and 408. There is no provision in the Civil Aeronautics Act, or any other act, whereby the Board may *compel* one air carrier to transfer a route certificate to another air carrier.

Thus before a route certificate may be transferred from one carrier to another[3] the two carriers must negotiate to a meeting of the minds, followed by a contract setting forth precisely the terms and conditions under which the one, voluntarily, is willing to sell and the other, voluntarily, is willing to buy. This is what Western and United did. The contract is then submitted to the Board for its approval under Section 401(i) and, if applicable, under Section 408(b). If, after a hearing the Board find that the transfer would be in the public interest, or at least not contrary to the public interest, it becomes the duty of the Board to approve it. But that is all the Board is able to do—approve or disapprove. If the Board disapprove, the parties to the voluntary contract remain in *status quo* with no liability one to another. If the Board approve, the parties to the voluntary contract are at legal liberty to consummate it, should they choose to do so. If, during the in-

[3]The only possible legal exception to this statement would be if a carrier had its certificate revoked under Section 401(h) after a hearing for an intentional failure to comply with the act, followed by a reissuance of the certificate to some other carrier under Section 401(d).

terim between execution of the contract and its approval by the Board, the parties, by mutual concurrence, should experience a change of mind and should decide not to consummate the contract, they would be at liberty so to do. Or, if, after execution of the contract and after its approval, one party, for valid grounds, should choose to rescind it that party would be at liberty so to do.

The Board's approval is not mandatory, it is only permissive.

The Board does not have the power, statutory or otherwise, to rewrite the contract between the parties. The Board does not have the power, statutory or otherwise, to compel either party to give or take more than is provided for in the contract.

The only power the Board has—and this is deserving of emphasis—is the power to withhold its approval in the event either party should be unwilling to yield to appropriate conditions which the Board might find would be necessary to make the contract unobjectionable to the public interest. There is no legal weapon under which the Board may compel either party to a contract having as its *res* the transfer of an air certificate to abide by conditions which the Board may choose to impose and which the Board has a right to impose under the applicable section of the Civil Aeronautics Act. If either party do not choose to accept the approval as conditioned, the contract falls and the *status quo* is preserved.

This well seasoned principle seems to be recognized by the Board since this statement is found in its original opinion dated August 25, 1947:

> "One of the gravest mistakes this Board could make would be to assume that the end justifies the

means and that the Board could properly do indirectly by the exertion of such compulsion what it was not permitted by law to do directly. *We know of no direct or indirect means available under the existing law by which an air carrier can be forced against its will to transfer its property, business and certificate to another air carrier.* If such transfers are to be accomplished under the existing law it would seem that the inducement of reasonable market prices, except in rare instances, would be found necessary even though such prices contained sufficient commercial profits to the seller to generate a business incentive to sell. No declaration by this Board against the validity of fair commercial prices that contain an element of profit will be able to repeal the economic laws and business motives that influence exchange prices and impel business activity in a free economy." [I, R. 125-6.]

But the unconscionable method of imposing retroactive *ex post facto* conditions in this case suggests that the Board is not always too quick to practice that which it proclaims with such dignity.

The Board's proclamation, which it has not chosen to follow, and the principal point on which Western is relying, that the parties must be accorded the right of accepting or rejecting a conditional approval is fully supported by law beyond and in addition to the clear wording of the applicable sections of the Civil Aeronautics Act.

Section 1008(a) of the Administrative Procedure Act (5 U. S. C. A. 1008, 60 Stat. 242) provides:

"In the exercise of any power or authority—(a) No sanction shall be imposed or substantive rule or

order be issued except within jurisdiction delegated to the agency and as authorized by law."

The word sanction is defined in Section 1001(f) of the Administrative Procedure Act in this language:

> "'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action."

When the Board imposed onerous conditions upon Western under circumstances which effectively and completely denied to Western a choice of accepting or rejecting them, those conditions became sanctions which are prohibited by the quoted section of the Administrative Procedure Act.

The Board recognized with commendable clarity the very point Western is here urging when this declaration was made in the July 7, 1950 decision on the reopened procedure, in these words:

> *"Hence, the imposition of conditions does no more than give the parties to a certificate transfer an opportunity to modify the basis of their transaction and thereby to avoid the order of disapproval which the Board would otherwise be compelled to issue."* [II, R. 830.]

But the Board in its next breath flaunted its own admonition.

No more than a couple of questions is needed to kindle the assertion that Western was not accorded the right of accepting or rejecting the conditional approval. With the transaction having been completed, not simply with the Board's blessing but under the Board's compulsory directive, almost three years before the retroactive conditions were made known, how would it be possible from any practical standpoint to undo that which had been done and which had remained done for some three years? If United sustained a loss in its operation of the route during those three years, would Western have to make good that loss, or if United made a profit would United have to disgorge it to Western? In what condition would United have to return the equipment that went with the transaction—in its original condition or with reasonable wear and tear accepted? With the contract between Western and United fully consummated, how could Western enforce a "rescission", if that be the correct term, against United if United demurred to the proposal, as United quite obviously would?

The simple fact is that there is no possible method of sensible tint which could be appropriated to undo now that which has been done with Board sanction—in fact direction. Thus, unless this Court reverses the Board to the extent required to eliminate the *ex post facto* conditions, Western will have to accept them. And it would not matter whether those conditions should prove to be completely innocuous or burdensome to the point of bankruptcy.

The Board is fully aware of Western's untenable position. In its last order of December 29, 1950 denying Western's petition for a reconsideration of the reopened

order which is the subject of challenge, the Board made this barbed threat:

> "Western argues that there is no way in which the Board can enforce its order of July 7 and compel Western to comply with the conditions. But it seems to us that we have the same power in this case as in any other. Failure by Western to comply with the conditions of the July 7 order would render inoperative the approval heretofore granted under sections 401(i) and 408(b) of the transfer to United of Route 68 and related physical properties. *By refusing to comply with the conditions, Western would, unless it could undo the transaction with United, be placing itself in violation of sections 401(i) and 408(b) and would be subject to all the penal and enforcement provisions of the Act applicable to such violation.* The fact that Western might find it impractical to undo the transaction would not be a defense because the failure to impose conditions in the original order of approval was due to the Board's reliance on testimony by Western's president and because by consummating the transaction prior to the expiration of the time fixed for reconsideration, Western went ahead at its own risk." [II, R. 863-4.]

The Board's reference to its reliance on the testimony of Western's president will be discussed later. The limp excuse that Western went ahead at its own risk because it consummated the transaction prior to the expiration of the time fixed for reconsideration is dissolved by the fact that Western did not go forward at its own risk or its own volition but under the uncompromising mandate of the Board's order of September 11, 1950 (E-793) which cancelled Western's certificate for Route 68 at

12:01 A. M. on September 15, 1950, and at the same moment amended United's certificate for Route 1 to include Route 68. The thirty day period for filing a petition for reconsideration did not expire until September 24, 1950, some nine days after Western, by the Board's order, has been compelled to go ahead. But this did not entail any voluntary assumption of risk.

It might be well to pause here to note that under Section 285.11 of the Board's Rules of Practice a petition for rehearing must be filed within thirty days after service of the order sought to be vacated or modified. However, such a petition may be filed after the expiration of the thirty days by leave of the Board granted pursuant to formal application. There is no time limit specified in the rule after which the Board may not grant the right to file a petition for rehearing. Therefore, if the Board's frightening pronouncement were sound no party to a route transfer proceeding would ever dare go ahead under a Board order.

(b) Western's Position Is Supported by Case Law.

Support for the position urged by Western is found in reported decisions.

> "Upon defendant's compliance on October 1, 1890, with our decision of a month previous, this case had, so far as appeared in the record, been heard, decided and closed. We are not willing to consider this case reopened in this supplementary proceeding, which only concerns reparation, and rule upon questions in the original case which were not disposed of by our decision of September 5, 1890. As to reparations now demanded for damages claimed to have resulted from practices found unlawful by said

decision, *we think it would be unwise, as a matter of practice, and also unjust to the defendant, to amend the final Order entered herein nearly four years ago, and promptly obeyed by that company,* so as to subject the carrier to further requirements in favor of these complainants in respect of violations which were corrected under said order." (P. 457.)

Rice, Robinson & Witherop v. Western N. Y. & P. R. Co., 6 I. C. C. 455.

"The Commission is an administrative body. The rates, regulations and practices which it establishes within its jurisdiction become rules of action which may and must enter into the business dealings of this country. It may be necessary to change from time to time these rulings as varying conditions require, but they should never be changed except upon due notice to the public, which is affected by them, and *it would be altogether intolerable if the change could be made retroactively.* (Pp. 93, 94.)

* * * * * *

"This Commission cannot, without stultifying itself, make any ruling which will condemn as unlawful the payment of these elevator allowances during the time they have been expressly sanctioned by its decisions." (P. 94.)

Nebraska-Iowa Grain Co. v. U. P. R. R. Co., 15 I. C. C. 90.

"The law is well settled that *quasi* judicial bodies, like courts, may, on their own motion or by request, correct or amend any order still under their control without notice or hearing to the interested parties, *provided such parties cannot suffer by reason of the*

correction or amendment, or if the matters corrected or amended were embraced in testimoney taken at a previous hearing." (P. 888.)

In re Joe Brown & Sons, 263 N. W. 887 (1935), 273 Mich. 652.

"As to the transportation which occurred subsequent to September 7, 1933, the relief sought cannot be granted, because *there can be no retroactive repeal of orders prescribing maximum reasonable rates for the future.*" (P. 754.)

Otis Gin and Warehouse Co. v. Atchison, Topeka and Santa Fe Ry. Co., 219 I. C. C. 749.

"The enjoyment of the benefit of the order as made was an acceptance of the condition with which the Court saw fit to burden it. *The two should have been accepted or rejected as an entirety, and this course does not seem to have been followed.*" (P. 170.)

Ford v. Simmons, 121 Pac. 167 (Colo.), 52 Colo. 242.

Even criminals, when offered a conditional pardon, are accorded the privilege of accepting or rejecting the pardon as conditioned.

"A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected, we have discovered no power in a court to force it on him . . . A pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment." (P. 150.)

U. S. v. Wilson, 7 Peters 150, 8 L. Ed. 640.

"It is universally agreed that the pardon board may extend its mercy on such terms as it sees fit, and consequently may annex to the pardon any condition either precedent or subsequent, or both, on the performance of which validity of the pardon will depend, provided such conditions are neither immoral, impossible, nor illegal. *The prisoner may accept or reject it at his will;* but, once having accepted it, he becomes bound by all attaching conditions." (P. 757.)

Guy v. Utecht, 12 N. W. 2d 753, 216 Minn. 255.

"It has long been held that consent by the prisoner is a prerequisite to the validity of a conditional pardon because its terms may be more objectionable than the punishment fixed by the sentence. (U. S. v. Wilson, 7 Pet. 150 [8 L. ed. 640], and see cases cited in Annotation 52 A. L. R. 835.) The same conclusion having been reached in California many years ago, this Court held that to be effectual, a conditional pardon must be accepted by the prisoner." (P. 82.)

In re Peterson, 14 Cal. 2d 82, 92 P. 2d 890.

"That an applicant for probation has the right to decline the offer when he deems the terms in excess of the Court's jurisdiction, or too onerous is settled beyond any controversy." (P. 717.)

Lee v. Superior Court, 89 Cal. App. 2d 716, 201 P. 2d 882.

The invalidity of *ex post facto* conditions under the circumstances involved in the case at issue is even more pronounced than would be the attempted imposition of *ex post facto* condition to a pardon three years after

the convict had been released, and at a time when he had rehabilitated himself in society—cruel and invalid as such an act would be. The ex-criminal, nonetheless, at least would have the option of rejecting the conditions and resuming his penal servitude. Here Western, unless relieved by this Court, must abide by the retroactive conditions.

Although the Board's own interpretation of its own power may not be controlling, a good deal of significance must be attached to the Board's doubt of its own power to tamper with an issued certificate upon timely reconsideration of the original order. This statement of the Board appears in the supplemental opinion on reconsideration in the *Kansas City-Memphis-Florida* case, reported in 9 C. A. B. 401, commencing on page 408:

> "In view of our present decision affirming our former judgment, *it will be unnecessary to discuss the question vigorously presented by counsel for Chicago and Southern concerning the statutory power of the Board to revoke upon reconsideration a certificate of public convenience and necessity which was issued and made effective at the time of the original decision. We have grave doubt, however, as to our possession of such power,* and in future cases of this kind, except where national security or other urgent considerations dictate otherwise, we shall pursue a policy of making the certificate effective on such date as will permit reconsideration without creating the legal problem raised in the present case."

In recognition of this grave doubt it is the Board's current policy to make an order amending an old or granting a new certificate of public convenience and necessity effective after the last day on which a petition for reconsideration may be filed.

(c) The Board's Original Order Did Not Reserve Jurisdiction.

In its modifying order of July 7, 1950 (E-4444), which is the order under main fire, the Board purported to retain jurisdiction with this language:

> "The Board hereby retains jurisdiction of this proceeding for the purpose of modifying or clarifying any provisions of this order and for the purpose of imposing from time to time such other or further terms and conditions as to the Board may seem just and reasonable." [II, R. 847.]

It is not necessary to tussle with the validity of such a reservation since neither the order of August 25, 1947 nor the supplemental order of September 11, 1950, under which Western was compelled to, and did, act, contained a reservation of jurisdiction. But at least had the reservation which appears in the July 7, 1950 order been included in the August 25, 1947 order or the September 11, 1950 order, Western would have been given some warning of the possible pendency of doom. Under those circumstances there might have been some faint justification for a claim that Western went ahead at its own risk, had not Western halted long enough to ask for a clarification. Moreover, the fact that the Board inserted the reservation in the July 7, 1950 order must be interpreted as a confession of the weakness of its position for

not having given a similar warning in the order under which Western was forced to act.

This is the way the Interstate Commerce Commission has handled the matter of reserved jurisdiction:

> "Upon consideration of the evidence and circumstances in this case we are of the opinion that we should reserve jurisdiction, for a period of three years from date of consummation herein, to make such additional findings and impose such terms and conditions with respect to the employees of the carriers considered in the merger, as may be necessary, and lawful, if, upon petition by them, or their representatives, within that period it is shown that the condition of their employment or interests incident thereto have been, or will be, adversely affected by anything done or proposed to be done, pursuant to, or as a direct result of consummation of the merger under the authority herein granted. *Consummation of the transaction by Greyhound will be considered acceptance of such reservation of jurisdiction.*"
>
> *The Greyhound Corporation — Control — Southeastern Greyhound Lines, et al. v. M. C. F.— 4307, Oct. 3, 1950.*

(d) Western Is Not Estopped to Object to the Ex Post Facto Conditions.

In its decision and order of July 7, 1950, which first imposed the conditions, the Board recognized the vulnerability of its position and evidently endeavored to set up an anticipatory defense with this language:

> "The situation is not altered in this case by reason of the fact that we have already approved the transfer of Route 68 and related physical properties by Western to United without conditions for the benefit

of adversely affected employees and that the transfer thus approved has been consummated. As our opinion makes clear, in declining to impose conditions for the benefit of Western's employees in our original order of approval, we relied on the representations of Western's president that its employees would not be adversely affected by the transfer. United-Western, Acquisition of Air Carrier property, 8 C. A. B. 298, 311. *Regardless of whether we could modify our order to impose such conditions in the absence of those representations, we think it clear that Western by reason of them is estopped to challenge any such modification in this proceeding.*" [II, R. 831.]

Resorting to such a plea does little credit to the dignity and judicial timbre of a high and important administrative agency.

This is what Mr. Drinkwater, who became president of Western on January 1, 1947, said during the original hearing on May 20, 1947:

"Q. When you say there that you intend to absorb substantially all of the personnel, I just wondered why the qualification? A. Of substantially?

Q. Yes. A. Because we have too many people in most places in Western Airlines, and we are trying to reduce our overhead, and reduce the number of employees wherever we can. *I did not want to say that we would absorb them all because as we get further into the situation, we may find we have too many folks, but generally speaking we know we will need at least 14 flight crews to fly between San Francisco and Seattle, to say nothing of Mexico City.* We know we will need station personnel at Seattle, in number and experience and classification

which will certainly be analogous to our present personnel in Denver.

Q. You estimate what percentage of your personnel will probably be taken over? A. Percentage of what personnel?

Q. The personnel on Route 68 now. A. You mean Denver, Grand Junction and the pilots?

Q. Yes. A. All of the flight crews, 100 per cent of the flight crews, and I suppose, well, everybody in Grand Junction who wants a job, and everybody in Denver who wants a job that is a competent person, is going to get a job. We have to leave some people in Denver to operate Inland Airlines, of course. But aside from the general reduction in personnel which is still going on in Western Airlines, we would take care of all of these people.

Q. Would this reduction in the personnel on Route 68 be made regardless of whether the sale were approved? A. Yes. It is the same program that is going on on routes 13, 19, 63, 52 and 6.

Q. Then actually you intend to absorb all of the personnel that you would have kept anyway? A. Subject to that qualification, yes." [I, R. 41-2.]

In the original decision of August 25, 1947 the Board had this to say on the subject:

"The intervener, Air Line Pilots Association, urges that the Board require as a condition of approval of the sale of route No. 68 that the pilots on the Denver-Los Angeles division should be taken over by United and given full employment and senior-

ity rights without prejudices. It is not clear from the testimony that the local organizations of Western and United pilots subscribe to this policy. *Western's president testified that Western had every intention of retaining the 14 flight crews operating on route No. 68 in the event this transaction is approved and transferring them subject to their seniority.* This witness testified that Western would need more than the 14 crews available from the sale of route No. 68 in order to operate the Seattle extension and the Mexico City route. The witness also testified that no employee of Western will be released because of this transaction and that every competent employee in the employment of the company at Grand Junction and Denver will continue with Western, that the company will probably need more employees at Portland and Seattle than it presently employs at Denver and Grand Junction, and that Western will pay the employees' moving expenses. The evidence shows that the question of transfer of pilot personnel was not discussed in the negotiation preceding this transaction, nor was it a condition of the sale. It is clear from the record that Western's pilots will continue to be employed by Western, retaining their seniority and other rights, and that every other competent employee on route No. 68, who would be retained by the company if this transaction had not been proposed, will continue to be employed by the company with full rights. *Therefore, since there is nothing that would indicate that any of the rights of Western's present employees on route. No. 68 will be prejudiced*

by the acquisition and operation of that route by United, there appears to be no reason for any condition of the nature urged by the Air Line Pilots Association." [I, R. 97-8.]

Although Mr. Drinkwater used the words *"substantially* all of the personnel" and although the Board knew that when he was testifying he had only the benefit of human foresight, rather than hindsight, and although in its original opinion the Board only quoted Mr. Drinkwater as having said that Western had *"every intention* of retaining the 14 crews operating on Route 68", the Board in its July 7, 1950 decision claims that it relied on the *representations* of Western's president that its employees would not be adversely affected by the transfer.

The record in the reopened proceeding would support, if, in fact, it did not compel, a finding that the employees of Western were not adversely affected by the transfer of the route, but since the force of the other points urged by Western make it unnecessary to impose upon this Court the burden of weighing the evidence[4] that point will not be urged in this opening brief.

In all events the Board's belated contention that it was misled by the "representations" of Western's president

[4]Under the Administrative Procedure Act courts reviewing an order of an administrative agency have much greater latitude in scrutinizing the evidence than is the case in an appeal from a lower court. *Universal Camera Corp. v. NLRB,* 95 L. Ed. Advance Opinions 304.

and that Western is now estopped to complain of legal error is at best a transparent and unvaliant shield behind which the Board seeks to defend its change of mind.

A startling innovation in our precepts of law would result if the good faith predictions of a witness, though later they proved to be inaccurate, could be used by a judicial body to sustain a decree that otherwise would be unlawful. Estoppel, even though the elements existed, cannot be used as a prop to uphold an invalid judgment of a judicial or *quasi* judicial body.

To establish estoppel, in situations where estoppel may be a defense, a false representation must be made with knowledge, actual or constructive, of the real facts, and the party to whom it was made must have been without knowledge or the means of knowledge of the real facts.[5]

If the doctrine of estoppel could be brought into play for the purpose of upholding or defeating a judicial or *quasi* judicial decree the Board would be estopped, not Western. The Board led, or, more properly, pushed, Western into consummating its written contract with United without the slightest warning that some three years later onerous conditions might be imposed, with no opportunity given to accept or reject the approval as conditioned. Here are all of the essential elements that give rise to the doctrine of estoppel.

[5]*Current News Features, Inc. v. Pulitzer Publishing Co.,* 81 F. 2d 288; *Grouf v. State National Bank of St. Louis,* 40 F. 2d 2; *Gruber et al. v. Savannah River Lumber Co.,* 2 F. 2d 418.

II.

The Board Had No Legal Right to Force Western to Accept Arbitration.

The order of July 7, 1950 decrees that Western shall (not may) submit to arbitration the question of the identity of the Western employees who sustained monetary losses as a result of the transfer of Route 68, and the amounts which each employee should be paid as compensation. The order includes this directive:

> "9. Western shall, within such time as the arbitration tribunal shall fix, *comply with the provisions of the arbitration award.*" [II, R. 847.]

There is no provision in the order for appealing to the Board for relief against an unconscionable arbitration award. And once the time to appeal from the Board's order had expired there would be no right to seek court relief if the arbitrators were to hand down an award unsupported by the evidence.

Assuming, to which Western will not accede, that the Board has the power to attach either prospective or retroactive conditions to its approval, under Section 401(i), of the transfer of the certificate or its approval, under Section 408(b), of the agreement, the conditions must be fixed by the Board, not by someone delegated by the Board. At the very least, Western has the right to a finding by the expert and judicious members of the Board that the conditions imposed are just and reasonable. Western reposes confidence in the individual members of the Board and in the Board itself, notwithstanding the commission of occasional errors. Western would have no occasion to have confidence in three arbitrators, only one of whom would be designated by Western, one

of whom would be known to be prejudiced against Western, and none of whom would be under oath of office or who would hold tenure of position exerting a force of good faith administration.

It is no answer to say that the order and the later supplements attempt to define limitations within which the three arbitrators may act. The fact remains that if the order be allowed to stand the three arbitrators will have the plenary, final and unappealable power to name which of Western's employees were harmed by the transfer and how much Western must pay each.

Under Section 408 the Board's right to impose any type of condition upon its approval is limited to conditions which the Board shall find to be just and reasonable. A finding that the affected employees and the amount of damage should be determined by arbitration is not a finding that the determination of the arbitrators is, or will be, just and reasonable. Since the Board set up no procedure for accepting, rejecting or modifying the award of the arbitrators it would not be possible for the Board to make a finding on this point which would be responsive to the law.

It is not contended that court commissioners or agency examiners do not play a proper and legal function in judicial and *quasi* judicial procedures. But an unbridged gap exists between the recommendations of a commissioner or examiner which may be accepted, rejected or modified by the court or the Board, and an award of three arbitrators which cannot be touched by the agency ordering the arbitration and which cannot be subjected to judicial test by a review of a court of law.

III.

Western Was Denied a Speedy Determination of Its Rights and Duties as Required by the Administrative Procedure Act.

On March 7, 1947 Western and United jointly filed an application with the Board for approval of the agreement relating to the transfer of Route 68. Between the 20th and 22nd of May, 1947, only two and one-half months later, the hearing was held before an examiner in Washington. On August 25, 1947 the Board issued its original opinion and order approving the transaction without any labor protective conditions. The transaction was fully consummated on September 15, 1947 under the Board's mandatory supplemental order of September 11, 1947. These procedural steps reveal what can be done in concluding a matter with reasonable dispatch.

A rather shocking contrast exists between the original proceedings and the reopened proceedings.

On September 24, 1947 the Air Line Pilots Association filed a petition for reconsideration of the original order. This was followed on September 25, 1947 by a similar petition on behalf of the Air Line Mechanics, and on October 13, 1947 by a like petition on behalf of the Brotherhood of Railway and Steamship Clerks. On August 25, 1948, *almost a year later,* the petitions for reconsideration were granted. Between the 14th and 17th of November, 1949, *now more than two years after the original order,* the hearing on the reopened proceedings was held in Washington. On July 7, 1950, *only two months short of three years after the original order,* the

Board came out with the reopened order imposing upon Western alone *ex post facto* labor protective conditions. On December 29, 1950 Western's petition to reconsider the order on the reopened proceedings was denied and the matter came to final rest on the Board's docket.

Section 1005(a) of the Administrative Procedure Act (5 U. S. C. 1005), which became effective in September, 1946, provides in part that "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives."

The Supreme Court of the United States said this about the Administrative Procedure Act in *United States v. Morgan Salt Co.*, 94 L. Ed. 402, 338 U. S. 632 at page 411 of L. Ed.:

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards, even narrower than the constitutional ones, against arbitrary official encroachment on private rights."

If the Administrative Procedure Act is to be given meaning, the Board's order in the reopened proceedings which is being challenged on this review should be reversed on the single ground that the Board brought the reopened proceeding to a conclusion only after an utterly

unreasonable and inexcusable delay. Regardless of the Board's right to impose *ex post facto* conditions after requiring consummation of the unconditionally approved agreement by the order of September 11, 1947, it would be a signal injustice to say that the Board responded to the provisions of the Administrative Procedure Act, and particularly the quoted provision of Section 1005(a), when it held over Western's head for almost three years the threat of adding burdensome conditions to a previous unconditional and fully implemented approval.

IV.

The Board Abused Legal Principles in Imposing Conditions on Western Alone.

The labor protective conditions belatedly added by the Board are imposed on Western alone. This was done notwithstanding the fact that the Air Line Pilots Association throughout the proceeding adhered to the position that the pilots should go with the route. [I, R. 323-4.] The Board sidestepped the wishes of the pilots with this language:

> "ALPA has recommended that we require United to integrate into its seniority list six Western pilots to be designated pursuant to a formula arrived at by arbitration between Western pilots and United pilots. However, Public Counsel suggest that there is some doubt of our legal power to order United to absorb these employees in light of the peculiar facts of this case.

"It is not necessary for us to decide this question of our legal power. *Under the circumstances present herein, we do not deem it appropriate or practical to apply such condition to United retroactively.*" [II, R. 833.]

Later it will be argued briefly that the Board has no authority, prospectively or retroactively, to impose labor protective conditions against either the transferor or transferee when approving a route transfer. But assuming for the moment that the Board does have that power and assuming that exercising it in *ex post facto* fashion violence would not be done to equity or law, the theory under which labor protective conditions are permitted in railroad cases will not countenance the imposition of the conditions on Western alone.

The Supreme Court of the United States in *United States v. Lowden,* 84 L. Ed. 208, 308 U. S. 225, which is the fountainhead for labor protective conditions in the railroad industry, noted that the security holders would benefit by the economies stemming from the lease and that the resulting savings would be used only in part to compensate the affected employees.

Here United acquired additional operating rights and additional operating equipment involving an expansion of its over-all operations, and presumptively involving an enlargement of its personnel needs. In addition United bettered its income and profit potential. To the contrary Western cut back its operating rights and reduced its operating equipment, although both the cut-back and

reduction in effect were neutralized by an almost concurrent expansion of its operating privileges by an award from the Board extending Western's operations from San Francisco up to Seattle. Western's income and profit potential likewise was reduced by the transfer, though this, too, was largely offset by the new award to Seattle.

Under the circumstances framing this particular case United was the principal beneficiary. If either party were to be called upon to share its benefits with labor that party should have been United, not Western. In any event United should have been included as a participant in the plan.

The foundation of labor protective conditions in the railroad industry is social in effect and intent. The essence seems to be that those who benefit by the transaction should be called upon to share their benefits with those who will be burdened in consequence of the transaction. If a similar precept is to be translated into the relatively new and entirely different air transportation industry by case law, those who reap the benefits should be made to bear the burdens proportionately.

In urging this point Western is not to be understood as advocating the philosophy of the Air Line Pilots Association that the pilot should go with the route. Western would resist with great vigor the adoption of that theory, whether imposed on Western or one of its fellow members of the industry.

V.

The Board Has No Statutory or Judicial Authority to Impose Labor Protective Conditions.

Since the Board's order of July 7, 1950 must be reversed on the grounds which have been urged up to this point, the illegality of any labor protective conditions in the air transportation industry will not be stressed or argued in detail. To analyze this point to the extent that would be proper, were it the principal point on which Western had to rely, very many pages in this brief would be used. The point is being noted in brief fashion largely to place on record Western's position and to add collateral substances to the other points which have been urged.

As a preface it may not be trespassing too far off the record to note that Western was involved in its first organized labor strike during its twenty-five years of existence only after the turn of the last half of the current year. Western is proud of the happy labor relations it has enjoyed and dedicates itself to maintaining those relations to the continuing betterment of the well-being of its employees, consistent with the rights of the air traveling public and the rights of the beneficial owners of the company who have made possible the payment of salaries and wages.

Western does not question the right of the Interstate Commerce Commission to impose labor protective conditions in certain transactions pertaining to the railroad industry. This right was first established by the United States Supreme Court in the *Lowden* case, which has been cited. That case has been bolstered by *Interstate*

Commerce Commission v. Railway Labor Executives' Association, 315 U. S. 373, 86 L. Ed. 904 (1942), and in *Railway Labor Executives' Association v. United States,* 339 U. S. 142 (1950).

In addition to the case law the protective conditions in the railroad industry are mandatory in certain matters under Section 5(2)(f) of the Transportation Act of 1940 (49 U. S. C. 5). A similar provision with respect to telegraph carriers is found in Section 222(f) of the Communications Act (47 U. S. C. A. 222).

But the opinion in the *Lowden* case is replete with language making it clear that the principle established by that decision was meant to apply to railroads alone. The reasoning that led to the conclusion reached by the Court was based on the unusual and unique economic conditions then prevailing in the railroad industry. That industry then had reached its zenith of development. It was enthralled in economic disturbances. Much agitation was in flow, and official investigations in process, to determine a program of merging and consolidating to eliminate areas of dry rot. Known to the Supreme Court, which no doubt had a measure of influence, Congress was in the process of enacting legislation which ultimately became Section 5(2)(f) of the Transportation Act. It must have been realized by the Supreme Court that volcanic consequences might have afflicted the railroad industry if some labor protective conditions were not permitted in connection with the expected and hoped for onrush of mergers and consolidations.

As a clear warning that the *Lowden* decision was intended to be confined to the railroad industry and its unique involvements and was not intended to permit the enforcement of labor protective conditions in other industries the Court was careful to make this statement:

> "Moreover we cannot say that *this limited and special application of the principle,* fully recognized in our cases sustaining workmen's compensation acts, that a business may be required to carry the burden of employee wastage incident to its operation, infringes due process." (P. 219 L. Ed.)

The airline industry is still young, compared to the status of the railroads when the *Lowden* case recognized the law that was then in the Congressional mill. The airlines are still growing in route expansion as well as technical advancements. There are no large areas of dry rot in the airline industry as there were in the railroad industry such as to call for judicial as well as legislative action. Some mergers and some route adjustments in the airline industry might be helpful, but there is no need for wholesale adjustments. There is no projected program in the airline industry which might cause major displacements of airline personnel, in turn resulting in an uneasy jolt to the national economy.

Time will not be consumed in citing cases which proclaim the principle that the authority of administrative agencies is confined to the boundaries specified in the implementing statute. Nor will space be used to quote from cases which declaim against administrative legis-

lation. The colored thread of this point is that neither statutory nor social justification may be found for administrative or judicial enlargement of the Board's power to the point that it may impose labor protective conditions on the approval of voluntary contractual transactions among air carriers.

Had Congress thought that the airline industry had reached a comparable status with the railroads of full development brinking on insipient deterioration it is quite certain that the Civil Aeronautics Act would have been amended long before this to add a section similar to Section 5(2)(f) of the Transportation Act which was added to the books in 1940 and which formed the encouragement that the United States Supreme Court needed to bolster the *Lowden* decision. Since Congress has chosen to remain silent on the matter it is not right that the Board should be allowed to enlarge its own authority.

This short treatment of a matter of compelling importance to Western and to the airline industry is not to be construed as a lack of faith in the argument or as an intimatiton that it is not deserving of high judicial treatment. So long as the other points argued give a firm basis for a reversal it is thought that this point would be deemed moot and that a decision on it might better be reserved for another case, should the Board continue to insist upon its right to legislate administratively.

Conclusion.

Unless the Board's order of July 7, 1950, as supplemented by the order of December 29, 1950, be reversed in so far as it imposes labor protective conditions on the prior unconditional approval, an injustice will be visited on Western and a bad, dangerous and ill conceived administrative procedure will be established by judicial precedence.

The challenged orders of the Board should be reversed in accordance with the relief requested in Western's petition for review.

August 27, 1951.

Respectfully submitted,

GUTHRIE, DARLING & SHATTUCK,
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Attorneys for Petitioner.

APPENDIX.

Pertinent Paragraphs of Sections 401, 408 and 412 of the Civil Aeronautics Act, as Amended.

Certificate Required.

Sec. 401 (49 U. S. Code 481). (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: Provided, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

Application for Certificate.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition

to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

ISSUANCE OF CERTIFICATE.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity. If it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

* * * * * * *

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE.

(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision

of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

TRANSFER OF CERTIFICATE.

(i) No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest.

* * * * * * *

ACTS PROHIBITED.

Sec. 408 (49 U. S. Code 488). (a) It shall be unlawful, unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged

in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

Power of Board.

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to

have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: Provided, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: Provided, further, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

* * * * * * *

FILING OF AGREEMENTS REQUIRED.

Section 412 (49 U. S. Code 492) (a) Every air carrier shall file with the Board a true copy, or if oral, a true

and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise), affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

Approval by Board.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancelation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it. (As amended by Public Law 558, 77th Congress, approved May 16, 1942; 56 Stat. 301.)

Certificate of Service.

I certify that I am an associate of the firm of Guthrie, Darling & Shattuck, attorneys for Western Air Lines, Inc., and that on this date I will have caused to be served the foregoing brief upon all attorneys of record and upon the attorneys for United Air Lines, Inc., the Air Line Pilots Association and the Air Line Mechanics Division by mailing three copies to each, properly addressed with postage prepaid.

Los Angeles, California, August 27, 1951.

George G. Gute.

No. 12867

In the United States Court of Appeals for the Ninth Circuit

WESTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

BRIEF FOR RESPONDENT

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FILED

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In the United States Court of Appeals for the Ninth Circuit

No. 12867

WESTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

BRIEF FOR RESPONDENT

JURISDICTIONAL STATEMENT

The jurisdiction of the Civil Aeronautics Board to issue the orders under review rests on Sections 205, 401 and 408 of the Civil Aeronautics Act, of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401 *et seq.*, and was invoked by petitions for intervention and reconsideration filed in a proceeding before the Board known as Docket No. 2839 (R. 13, 14, 192, 214, 218, 240). The jurisdiction of this Court to review these orders rests on Section 1006 of the Act (52 Stat. 1024, 49 U. S. C. 646) and was invoked by a petition for review filed April 18, 1951 (R. 875, 883).

COUNTERSTATEMENT OF THE CASE

Petitioner (Western) herein seeks review of two orders of the Civil Aeronautics Board imposing labor protective provisions as a condition to the transfer by Western to United Air Lines of a certificate of public

convenience and necessity for operation between Denver and Los Angeles (Route 68), and of various properties incident thereto. Other than as indicated below, the course of the proceeding before the Board is outlined with substantial accuracy in Western's brief.

The original transfer proceeding before the Board encompassed the issue of whether the Board should condition its approval of the proposed transfer upon the observance by the parties of provisions designed to protect adversely affected employees. The Air Line Pilots Association, an intervenor in the proceeding, specifically requested that protective conditions be imposed for the benefit of the Western pilots assigned to Route 68 (R. 16, 25). A similar request was made by the Brotherhood of Railway and Steamship Clerks on behalf of the Western clerical employees (R. 64–65). Western agreed to submit data at the hearing concerning the effect of the transfer upon employees (R. 21, 31), and a portion of the hearing was devoted to this problem. Western's president testified that, other than as a matter of principle, Western had no objection to the imposing of labor protective conditions (R. 43), but that the matter was "entirely academic because there are not going to be any personnel dropped as the result of route sale" (R. 44).[1] In reliance upon this testimony, the Board failed to condition its initial approval of the transfer, entered on August 25, 1947,

[1] As the purport of Mr. Drinkwater's testimony on this matter is crucial, the testimony is set forth in full as an appendix to this brief (*infra*, p. 25).

on compliance with labor protective conditions. The Board made the following findings (R. 97–98):

> * * * Western's president testified that Western had every intention of retaining the 14 flight crews operating on route No. 68 in the event this transaction is approved and transferring them subject to their seniority. This witness testified that Western would need more than the 14 crews available from the sale of route No. 68 in order to operate the Seattle extension and the Mexico City route. The witness also testified that no employee of Western will be released because of this transaction and that every competent employee in the employment of the company at Grand Junction and Denver will continue with Western, that the company will probably need more employees at Portland and Seattle than it presently employs at Denver and Grand Junction, and that Western will pay the employees' moving expenses. The evidence shows that the question of transfer of pilot personnel was not discussed in the negotiation preceding this transaction, nor was it a condition of the sale. *It is clear from the record that Western's pilots will continue to be employed by Western, retaining their seniority and other rights, and that every other competent employee on route No. 68, who would be retained by the company if this transaction had not been proposed, will continue to be employed by the company with full rights.* Therefore, since there is nothing that would indicate that any of the rights of Western's present employees on route No. 68 will be prejudiced by the acquisition and operation of that route by United, there appears to be no

reason for any condition of the nature urged by the Air Line Pilots Association. [Emphasis supplied.]

On September 4, 1947, *ten days after the initial approval by the Board of the transfer of Route 68,* Western notified 23 of its pilots that new schedules would require their removal from the payroll effective September 19, 1947 (R. 194). *Five days later,* on September 9, 1947, other Western employees were notified by letter that they would be furloughed on September 14, 1941, "due to the disposal of Route 68" (R. 821). Still later, and without knowledge of these facts, the Board on September 11, 1947, issued its supplemental order transferring the certificate for Route 68 to United effective September 15, 1947 (R. 894–903). The effective date of this reissued certificate was that provided for in the agreement between Western and United (R. 12).

On September 24, 1947, within the thirty-day period provided for the filing of petitions for reconsideration of Board orders,[2] the Air Line Pilots Association filed a petition for reconsideration of the Board's initial order of approval (R. 192). The petition alleged in substance that, contrary to Mr. Drinkwater's assurances, Western's pilots were in fact being discharged because of the transfer of Route 68, and requested that labor protective conditions be imposed. The Air Line Mechanics Division, U. A. W.-C. I. O., and the Brotherhood of Railway and Steamship Clerks, who represented Western's

[2] Rule 11 of the Board's Rules of Practice, 14 C. F. R. (1946 Supp.) 285.11.

mechanical and clerical employees, filed similar petitions with the Board (R. 218, 240). On September 29, 1947, Public Counsel recommended that the Board defer passing upon these petitions until the parties had made an effort to reach voluntary arrangements for the protection of Western's displaced employees. And it was recommended that if the parties should fail to agree, the proceeding be reopened for the purpose of determining what employee protective conditions, if any, should be imposed (R. 228).

Pursuant to the foregoing recommendation, the Board determined to make an effort to reach a settlement of the problem without further hearings and by letter of November 5, 1947, so advised the parties. In this letter the Board requested the parties to attend a conference with the Board and to furnish the Board with certain data bearing on the employee issues (R. 810). This conference was held in Washington, D. C., on December 5, 1947. At the close of the conference the Board recommended that the parties reach a voluntary agreement for the protection of adversely affected employees (R. 811). These efforts came to naught because Western would not agree to any basis for employee protection until the adversely affected employees had been individually identified. By letter of March 25, 1948, the Board again urged the parties to reach a voluntary settlement and informed Western that it was the Board's view that the parties should first determine a formula to cover adversely affected employees and that individual identification should be deferred (R. 812–813).

On July 9, 1948, the Brotherhood of Railway and

Steamship Clerks advised the Board that efforts to negotiate an agreement had failed because Western still insisted on individual identification of adversely affected employees. The Brotherhood asserted that by reason of Western's "open defiance" of the Board's recommendation and instructions nothing could be accomplished by any further conferences (R. 814–815).

Thereafter, on August 25, 1948, the Board reopened the proceeding for the purpose of determining whether any employees of Western had been adversely affected as a result of the transfer of Route 68, and if so, whether any employee protective conditions should be attached to the Board's approval of the transfer (R. 245). After completion of customary procedural steps detailed in n. 10, p. 19, *infra,* the Board on July 7, 1950 issued its Opinion and Order No. E–4444 (R. 815) providing for the protection of adversely affected employeees. A clarifying order was subsequently issued on December 29, 1950 (Order No. E–4987, R. 861). Western seeks review of these two latter orders.

STATUTES AND REGULATIONS INVOLVED

Western has set forth as an appendix to its brief the majority of the provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401 *et seq.* (hereinafter sometimes referred to as the Act), to which references have been made herein. Other pertinent provisions of the Civil Aeronautics Act, the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 *et seq.,* and the Board's

Regulations are cited or quoted in their appropriate place in the text of this brief.

QUESTION PRESENTED

1. Is the Board authorized to impose labor protective conditions upon the transfer of a certificate of public convenience and necessity and the air carrier properties connected therewith?

2. Was the Board authorized, subsequent to consummation of the transfer, to make its approval of the transfer conditional upon compliance with labor protective provisions where the initial order of approval had not become final because of the filing of a timely petition for reconsideration, and where the omission of labor protective conditions from the initial order was a result of petitioner's misrepresentations to the Board?

3. Did the Board err in imposing labor protective conditions only upon Western?

4. Is Western's request for review of the arbitration provisions of the Board's order premature, and if not, did the Board err in requiring Western to submit to arbitration in accordance with specific standards prescribed by the Board?

SUMMARY OF ARGUMENT

I

The Board is expressly authorized by the Civil Aeronautics Act to prescribe as a condition to its approval of transfers of certificates of public convenience and necessity, where aircraft properties are

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also transferred, such reasonable terms and limitations as may be required by the public interest. The public interest in uninterrupted and efficient air transportation services obviously is furthered by just and equitable treatment accorded to airline employees. Thus, the prescription of reasonable labor protective conditions clearly falls within the Board's statutory authority, just as the imposition of similar conditions has been held to fall within the authority of the Interstate Commerce Commission. *United States* v. *Lowden,* 308 U. S. 225 (1939).

II

The imposition of the labor protective conditions here involved was lawful and reasonable. The Board retained jurisdiction over its initial order of approval of the transfer by virtue of the timely filing of a petition for reconsideration of that order. Moreover, the initial order of approval omitted prescription of labor protective conditions solely because of the assurances made to the Board by Western's president that no employee would be discharged because of the route transfer. Accordingly, the Board was authorized to amend its order to remedy defects in its initial order of approval which were procured through misrepresentation.

Western voluntarily consummated the transfer agreement prior to the expiration of the time allowed for filing petitions for reconsideration. Western accordingly assumed the risk that labor protective conditions or other changes in the Board's order might subsequently be imposed. The Board acted promptly

to effectuate an informal adjustment of the matter, and promptly reopened the proceeding after these efforts proved futile.

The Board did not err in failing to impose conditions upon United. Only Western's employees were affected by the transfer, and United was not responsible for the delay which occurred in imposing the labor protective conditions. Under the circumstances of this case, it would have been unjust, as the Board found, to have imposed conditions upon United.

Western's objections to the arbitration procedure established by the Board are premature. Western may not find it necessary to resort to arbitration. Moreover, if it does, the Board has retained jurisdiction over the proceeding. Western may appeal to the Board from any unreasonable arbitration award, and may thereafter obtain judicial review of the disposition which the Board makes of that appeal. In any event, the arbitration procedures established accord with the customary procedure utilized by the Interstate Commerce Commission, and are entirely reasonable and proper.

ARGUMENT

I. The Board has authority to impose labor protective conditions upon a certificate and property transfer

The power of the Board to impose conditions upon its approval of a certificate transfer, with or without a transfer of the air carrier properties incident thereto, cannot be seriously questioned. Insofar as the transfer of a bare certificate (*i. e.,* without transfer of air carrier properties) is concerned, section 401

(i) of the Act (52 Stat. 987, 49 U. S. C. 481 (i), p. 3 of Appendix to Pet. brief) provides that such a transfer shall not be approved unless found by the Board to be "consistent with the public interest." The power of the Board to approve or disapprove a certificate transfer includes the implied power to grant approval contingent upon compliance with specified conditions. *Cf. United States* v. *Rock Island Motor Transit,* 340 U. S. 419, 444, 449 (1951); *United States* v. *Resler,* 313 U. S. 57 (1941); *Air Cargo, Inc., Agreement,* 9 C. A. B. 468, 471, 472 (1948); see R. 829, 830.[3]

In instances, such as the present, in which air carrier properties are to be transferred with the certificate, Board approval under Section 408 of the Act (52 Stat. 1001, 49 U. S. C. 488, p. 3 of Appendix to Pet. brief) is also required. This latter section expressly provides that, unless the Board finds that the property acquisition "will not be consistent with the public interest * * * it shall by order, approve [such acquisition] * * * upon such terms and

[3] Actually, it is believed that the Board has express statutory authority to impose conditions upon certificate transfers. Section 401 (a) of the Act (52 Stat. 987, 49 U. S. C. 481 (a)) provides in pertinent part that "no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing *such* air carrier to engage in such transportation." (Emphasis supplied.) Accordingly, a certificate transfer necessarily must be effecuated by the reissuance of the certificate to the transferee, since otherwise section 401 (a) violations would occur. Such reissuance brings into play the provisions of section 401 (f) (52 Stat. 987, 49 U. S. C. 481 (f)), which expressly authorizes the Board, at the time of issuance of a certificate, to impose "such reasonable terms, conditions, and limitations as the public interest may require."

conditions as it shall find to be just and reasonable and with such modifications as it may prescribe." Thus, the problem here presented is not whether the Board has authority to impose conditions upon certificate and property transfers, which it clearly has, but whether labor protective conditions fall within the ambit of those conditions which the Board is authorized by statute to prescribe.

As the foregoing statutory provisions indicate, "public interest" is the touchstone by which the Board is to be guided in imposing conditions upon certificate and property transfers. The Supreme Court has held that the comparable provisions of the Interstate Commerce Act, which provided for the imposition of those conditions upon railroad mergers and consolidations which were "consistent with the public interest," authorized the Commission to impose labor protective conditions notwithstanding the absence of express statutory authority therefor. *United States* v. *Lowden,* 308 U. S. 225 (1939). The statutory provisions involved in the Lowden Case were substantially identical to the ones here involved.[4]

[4] At the time of the decision in the *Lowden* Case, the Interstate Commerce Act, Section 5 (4) (b) (49 U. S. C. 5 (4) (b) (1939), 48 Stat. 217) provided in part, "if after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation * * * (or) lease * * * will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving * * * such consolidation * * * (or) lease * * * upon the terms and conditions and with the modifications so found to be just and reasonable."

Moreover, the elements which the Interstate Commerce Commission was required to consider in determining "public interest," subsequently codified in the National Transportation Policy (54 Stat. 899, note preceding section 1 of Title 49 of the United States Code), are almost identical to those factors which the Civil Aeronautics Act requires the Board to consider in determining public interest.[5] Accordingly, the Board clearly possesses authority to impose reasonable labor protective conditions upon a certificate or property transfer.

Western seeks to avoid the controlling effect of the *Lowden* case upon the grounds that the Court was

[5] Section 2 of the Act (52 Stat. 980, 49 U. S. C. 402) provides:

"In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

there motivated by the extra-legal consideration of pending legislation in Congress, and that the conditions existing with reference to the railroads do not exist in the air transportation field (Pet. brief pp. 39–42). Neither of these arguments is persuasive, nor do they afford any basis for distinguishing the *Lowden* case. Insofar as the question of pending legislation is concerned, the Court in subsequent decisions has made clear that the amendments to the Interstate Commerce Act which specifically empowered the Commission to impose labor protective conditions merely made mandatory the imposition of such conditions, whereas they had previously been discretionary. *Interstate Commerce Commission* v. *Railway Labor Executives Association,* 315 U. S. 373, 379 (1942); *Railway Labor Executives Association* v. *United States,* 339 U. S. 142, 148 (1950).

In the *Lowden* case, the Court stated (308 U. S. at 239):

> we cannot say that the just and reasonable conditions imposed on appellees in this case will not promote the public interest in the statutory meaning by facilitating the national policy of railroad consolidation; that it will not tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances, or that it will not promote the efficiency of service which common experience teaches is advanced by the just and reasonable treatment of those who serve.

The major portion of this reasoning is equally applicable to the aviation industry. A stable labor force is as necessary to the uninterrupted functioning in

the public interest of interstate air commerce as the Supreme Court found it to be to interstate rail commerce. Congress has recognized this by specifically making the Railway Labor Act applicable to air carriers.[6] Moreover, it is common knowledge that strikes do occur in the airline industry, with resultant disruption of services peculiarly required at this time by the national defense and public welfare. To prevent a possible strike of air line employees through the imposition of labor protective conditions is to prevent an "interruption of interstate commerce through labor disputes growing out of labor grievances." Moreover, the "just and reasonable treatment of those who serve" the airlines has as direct an effect upon the efficiency of air line operations as similar treatment has upon railroad operations. The Board clearly has discretionary authority to determine, as it did in this case, that the public interest as defined by the Civil Aeronautics Act required the imposition of conditions for the protection of Western's employees.

II. The imposition upon Western of the labor protective conditions here involved represented a lawful and reasonable exercise of the Board's authority

A. It was proper to impose labor protective conditions following the consummation of the transfer since the Board's original order of approval had not become final, and had been procured through misrepresentations by Western to the Board

Western contends that the Board lacked jurisdiction to impose labor protective conditions subsequent

[6] Title II, Railway Labor Act, Section 201 (49 Stat. 1189, 45 U. S. C. 181), section 401 (l) of the Civil Aeronautics Act (52 Stat. 987, 49 U. S. C. 481 (l)).

to its initial approval of the transfer because no express reservation of authority therefor was contained in the initial order. But this contention overlooks the fact that a timely petition for reconsideration was filed by the Air Line Pilots Association (*supra,* p. 4). As in the case of petitions for rehearing in judicial proceedings, a petition for reconsideration of an administrative order serves to retain the agency's jurisdiction over the order of which reconsideration is sought. *Braniff Airways* v. *Civil Aeronautics Board,* 79 App. D. C. 341, 147 F. 2d 152 (1945); *Waterman S. S. Company* v. *Civil Aeronautics Board,* 159 F. 2d 828, 829 (C. A. 5, 1947), *rev'd. on other grounds,* 333 U. S. 103 (1948); *Falwell* v. *United States,* 69 F. Supp. 71 (W. D. Va., 1944), *aff'd.* 330 U. S. 807 (1947); see *United States* v. *Seatrain Lines,* 329 U. S. 424, 432 (1947).

Moreover, the absence of labor protective conditions in the Board's initial order of approval is attributable wholly to the representations which Western made to the Board. Western now contends that its President testified only that "*substantially* all of its personnel" (Br. 30) would be employed elsewhere. However, a reading of the entire testimony (appendix, *infra,* pp. 25–26) will disclose that Mr. Drinkwater unequivocally stated that no employee would be discharged because of the transfer, and that the use of the word "substantially" had reference to general reductions in force which would have been made even if the transfer had not been consummated. Whether this representation was made in good faith or not, the fact remains that

employees were notified in a matter of days after entry of the Board's initial order that they were being furloughed because of the route transfer. Accordingly, and irrespective of the fact that a timely filed petition for reconsideration was pending, the Board had authority to reopen the proceeding because its initial order was procured through misrepresentation. *Westhoven* v. *Public Utilities Commission,* 112 Ohio 411, 147 N. E. 759 (1925); *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, 472 (1942), *cited with approval, United States* v. *Seatrain Lines, Inc.,* 329 U. S. 424, 432 (1947); cf. *Federal Communications Commission* v. *WOKO, Inc.,* 329 U. S. 223, 227 (1946); *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 322 U. S. 238 (1944). We do not understand that an administrative agency may reexamine an order procured by misrepresentation only where that misrepresentation would support a conviction for perjury.

The situation is nowise altered by the issuance of the Board's order of September 11, 1947, transferring the certificate for Route No. 68. Western contends that this order mandatorily required a consummation of the transfer. This order carried out the voluntary agreement of the parties which provided that the agreement should become effective 21 days after its approval by the Board (R. 12). The Board did not purport to cut down the normal 30-day period for the filing of petitions for reconsideration. And the parties to the agreement could not as a matter of law defeat the right of other parties to request reconsideration, or the power of the Board to reconsider

its approval, by either providing for or consummating the agreement prior to the expiration of the time for reconsideration. *Falwell* v. *United States, supra.*

The basic issues here are whether the Board was entitled to rely upon Western's representations in framing the initial order of approval and whether, if so, the Board was entitled to take corrective action when those representations proved erroneous. Western's precipitous action in furloughing employees almost before the ink was dry on the initial approval order made it possible for the employees affected to file timely petitions for rehearing, and thus prevent the initial approval order from actually becoming final. But the Board's power in the premises should not and does not depend upon this happenstance. If Western had waited the full rehearing period, or had waited a year, before repudiating the assurances it gave the Board, the delay would not deprive the Board of the authority to modify its order in a manner appropriate to meet the evil of Western's making. Section 1005 (d), 52 Stat. 1023, 49 U. S. C. 645 (d).[7] That Western would carry out its assurances in good

[7] Section 1005 (d) provides as follows:

"Except as otherwise provided in this Act, the Board is empowered to suspend or modify its order upon such notice and in such manner as it shall deem proper."

See also Section 205 (a) (52 Stat. 984, 49 U. S. C. 425 (a)) which provides as follows:

"The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this act."

faith was an implicit condition of the Board's initial approval; when that faith was breached, the Board had the power and duty to make the condition explicit.

Western complains that it now has little choice but to comply with the Board's order since it is too late to rescind the certificate transfer. This contention overlooks the fact that Western advised the Board that it had no objections to labor protective conditions if the Board deemed such provision advisable[8] and also overlooks the fact that the same situation would exist if Western had refrained from misleading the Board in the first place. In that event, the Board would have included labor protective conditions in the initial order. Once the transfer was effected, Western would have been bound to comply with the provisions. Section 1005 (e) (52 Stat. 1023, 49 U. S. C. 645 (e)).[9] To be sure, Western would have been apprised of the exact nature of the protective provisions at a time when it might still have been able to back out of the transfer agreement. But Western hardly has standing now to complain of the situation in which it finds itself. If knowledge of the labor provisions to be imposed was essential to the decision as to whether to go ahead with the transfer,

[8] Mr. Drinkwater stated (R. 43): "* * * if the Board sees fit and thinks that it has the power to put such [labor] restrictions in any approval, why, we would not object to it, except on the matter of broad principles, as I have just said * * *."

[9] Section 1005 (e) (52 Stat. 1023, 49 U. S. C. 645 (e)), provides as follows:

"It shall be the duty of every person subject to this act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Board under this act affecting such person so long as the same shall remain in effect."

the honorable and prudent course for Western became clear the moment that it realized that its assurances to the Board were in error. It should at once have (1) notified the Board of its new position, and (2) requested delay in effectuation of the certificate transfer until the question of prescription of labor conditions should finally be determined.

Western eschewed this honorable and prudent course. It went ahead with the transfer, and it resisted any effort to have the Board's order modified to protect the employees of Western who were adversely affected by the transfer. Yet Western waited almost three years, until September 22, 1950 (R. 860–1), to raise before the Board any challenge to the power of the Board to attach conditions after consummation of the transfer. We submit that in these circumstances Western must be deemed to have assumed the risk that its conduct so plainly created.

Western is in no position to contend that an unreasonable period of time elapsed between the initial order of approval and the final order prescribing conditions. As heretofore indicated, the Board took prompt action to reach a voluntary settlement of the matter, which came to naught. When this fact became apparent, the Board promptly reopened the case (*supra,* p. 6). The delays after reopening were the normal ones resulting from requests for extensions of time, of which Western made its share.[10]

[10] The Board's actions in attempting to reach a voluntary settlement of the controversy are detailed at pp. 5–6, *supra.* Proceedings following the Board's order of August 25, 1948, reopening the case were as follows: A prehearing conference was held on Octo-

Thus, the Board proceeded with "reasonable dispatch" to conclude the matter presented to it having "due regard * * * for the convenience and necessity of the parties or their representatives" (Administrative Procedure Act, Section 6 (a), 60 Stat. 240, 5 U. S. C. 1005 (a)).[11]

A situation thus existed in which Western was fully aware at all times that a substantial likelihood existed that reconsideration of the Board's initial order of approval would be sought and obtained.

ber 11, 1948, and a report of that conference issued on October 15, 1948. On October 24, 1948, Public Counsel requested further exhibits. A deadline for the exchange of exhibits was tentatively set for December 13, 1948, and hearing planned for January 10, 1949. The January hearing was initially postponed at the request of Public Counsel. Western's counsel requested additional time for the preparation of its exhibits, rebuttal exhibits, and delays in the hearing date in letters to Examiner Wrenn dated December 2, 1948, January 6, 1949, June 21, 1949, August 11, 1949, and September 30, 1949. Hearing was held on November 14, 1949. Western thereafter by letter dated March 21, 1950, requested a delay in the hearing of oral argument before the Board. Argument was held May 8, 1950. The Board's opinion and order in the reopened proceeding was entered July 7, 1950. Western then requested and was granted an extension of time within which to petition for reconsideration and actually filed such petition on September 22, 1950.

The above facts are not of record herein, but cannot be questioned, and are essential to any resolution of the issues raised by Western in Point III of its argument (Br. 34).

[11] In any event, we do not understand that a failure to proceed with "reasonable dispatch" in and of itself has the effect of vitiating otherwise valid administrative action. On the contrary, the requirement of "reasonable dispatch" contained in section 6 (a) of the Administrative Procedure Act obviously has relation to the power conferred upon courts by section 10 (e) thereof to compel "agency action unlawfully withheld" (60 Stat. 243, 5 U. S. C. 1009 (e)).

Yet Western voluntarily proceeded to consummate the transfer and thereafter contributed in large measure to the delays incident to the ultimate prescription of conditions. In the light of these facts, it is apparent that the Board's action was reasonable and proper.

B. The Board did not err in imposing labor protective conditions only upon Western

Western also complains because the labor protective conditions prescribed are applicable only to Western and not to United. However, Western has pointed to no legal requirement or administrative practice which compels the imposition of such conditions upon all parties to a route transfer proceeding. On the contrary, Western's primary argument is that United should have shared in the responsibility for the protection of Western's employees in that United was the principal financial beneficiary of the transaction. The record and the Board's findings approving the transaction do not support this conclusion. Further, if it were true, this fact would not be dispositive of the question. Western alone determined to sell in this case, and only Western's employees required protection. As the Board found, the imposition of conditions upon United would have been unfair after the transaction had been consummated (R. 833, 834). On the other hand, the delay in imposition of labor protective conditions was wholly attributable to Western, *supra,* p. 3. Accordingly, no injustice or abuse of discretion resulted from the imposition of these conditions only upon Western.

C. Western's objections to the arbitration provisions of the Board's order are premature; moreover, the provisions imposed are reasonable and proper

Western's final complaint is that the Board erred both in requiring Western to submit to arbitration for the purpose of resolving disputed questions concerning the identity of employees adversely affected and the amount of compensation due them, and in failing to provide for an appeal from the arbitration award. These contentions overlook the facts that there need not be any arbitration at all unless Western finds that it cannot reach agreement with its former employees (R. 844), and that the Board retained jurisdiction over the proceeding to prescribe the method of selecting the arbitration tribunal and the rules under which arbitration would be conducted (R. 845). Further, the Board retained general jurisdiction over the proceeding "for the purpose of modifying or clarifying any provisions of [its] order and for the purpose of imposing from time to time such other or further terms and conditions as to the Board may seem just and reasonable" (R. 847).

Accordingly, we submit that Western's complaint on this score is premature. It may never be necessary to resort to arbitration. Moreover, if arbitration is required, the Board has reserved jurisdiction over the details thereof. If an improper or unconscionable arbitration award is made, Western is at liberty to request the Board for relief therefrom. Whether such a request would be entertained is not now material. Review may be sought at that time of the Board's action upon such a request, and any

abuse of discretion on the part of the Board may then be corrected.

In any event, the Board clearly did not err in imposing requirements for arbitration upon Western. A detailed formula to be applied in determining compensation due to adversely affected employees was prescribed by the Board (R. 868–871), and the application of that formula is essentially a ministerial task. The arbitration procedure prescribed by the Board accords with customary procedure for settling labor disputes and further accords with the procedure prescribed by the Interstate Commerce Commission in the so-called Burlington formula which the Commission has employed in imposing labor protective conditions. *Chicago, Burlington, Quincy Railroad Abandonment,* 257 I. C. C. 700 (1944); *Oklahoma Ry. Co. Trustees Abandonment,* 257 I. C. C. 177 (1944). If this type of delegation of authority by resort to arbitration had not been intended by Congress, it is only reasonable to suppose that it would long since have been prohibited by the Interstate Commerce Act. Obviously an agency such as the Board is not required to immerse itself in the minute details of ascertaining all facts relating to all possibly affected employees in transfer cases or to ascertain for itself the precise monetary losses suffered by such employees. Moreover, as previously stated, Western may obtain either a review from the Board of an arbitration award and ultimate judicial review of the Board's decision, or immediate judicial review of any refusal by the Board to review an arbitration award.

CONCLUSION

Upon the basis of the foregoing reasons and authorities, the Board's orders should be affirmed.

Respectfully submitted.

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October 1951.

APPENDIX

Testimony of Terrell C. Drinkwater, President of Western Air Lines (R. 41–45)

Q. Turning to the question of the use of the personnel employed on route 68.

A. Yes, question 8 on page 10.

Q. Is that page 10?

A. Yes.

Q. When you say there that you intend to absorb substantially all of the personnel, I just wondered why the qualification.

A. Of substantially?

Q. Yes.

A. Because we have too many people in most places in Western Airlines, and we are trying to reduce our overhead, and reduce the number of employees wherever we can. I did not want to say that we would absorb them all because as we get further into the situation, we may find we have too many folks, but generally speaking we know we will need at least 14 flight crews to fly between San Francisco and Seattle, to say nothing of Mexico City. We know we will [267] need larger station complement at Portland, for instance, than we have at Grand Junction, and we know we will need station personnel at Seattle, in number and experience and classifications which will certainly be analogous to our present personnel in Denver.

Q. You estimate what percentage of your personnel will probably be taken over?

A. Percentage of what personnel?

Q. The personnel on route 68 now.

A. You mean Denver, Grand Junction and the pilots?

Q. Yes.

A. All of the flight crews, 100 percent of the flight crews, and I suppose, well, everybody in Grand Junction who wants a job, we are going to give them a job, and everybody in Denver who wants a job that is a competent person, is going to get a job. We have to leave some people in Denver to operate Inland Airlines, of course. But aside from the general reduction in personnel which is still going on in Western Airlines, we would take care of all of these people.

Q. Would this reduction in the personnel on route 68 be made regardless of whether the sale were approved?

A. Yes. It is the same program that is going on on routes 13, 19, 63, 52, and 6.

Q. Then actually you intend to absorb all of the personnel that you would have kept anyway?

A. Subject to that qualification, yes.

Q. If you are unable to absorb any of the personnel who might be left jobless as the result of this sale, do [268] you have any plans with respect to taking care of that personnel?

A. Well, there won't be any. The last question covers that.

Q. Well, you have no plans, then, because you don't contemplate any?

A. That is right. As a matter of fact, we will need more people probably. I am sure we will need more people. We will need more people to staff up in Portland and Seattle than we presently have in Denver and Grand Junction, let us put it that way.

Q. Have you discussed with United at all the question of taking over any of Western's personnel?

A. No.

Q. How would you feel about the Board putting conditions on any order of approval that it might issue relating to severance pay and cost of people moving who might be dropped as the result of this route transfer?

A. Well, I would not think that the Board would care to state how many employees an airline should have at a given station. It seems to me that would be a matter within the discretion of management of an airline.

But if the Board sees fit and thinks that it has the power to put such restrictions in any approval, why, we would not object to it, except on the matter of broad principles, as I have just said, that I don't think that the Board should undertake to tell each carrier how many people they should put at each station or for what purpose.

Examiner WRENN. Is that what you meant, or did you [269] have reference to personnel who might want to be transferred, and there would be moving expense?

By Mr. HIGHSAW:

Q. I have both in mind.

A. We pay the moving expenses. Every airline in the country does that. When you transfer them, you pay their moving expenses.

Q. With respect to any personnel that was dropped as the result of the route sale, you don't think the Board should put any restrictions on that, but you would accept them if any conditions were put in.

A. Well, it depends on what they were, but the question is entirely academic because there are not going to be any personnel dropped as the result of route sale. There may be some dropped because they

are incompetent, or we have too many folks, but not any dropped because of the route sale.

Q. These questions that I have regarding the balance sheet, and everything, I assume it would be more profitable to go into those with Mr. Taylor.

A. Yes.

Mr. HIGHSAW. I believe that is all, Mr. Examiner.

Examiner WENN. Airline Pilots Association, do you have any questions?

Cross-examination by Mr. MUNCH:

Q. This may seem repetitious in view of what has been brought out, but what now is your position regarding the pilots on this division? [270]

A. As this statement here reads, Mr. Munch, we have every intention of keeping every one of the 14 flight crews presently operated on route 68 in the event the Board approves this transaction, and transferring them, subject to their seniority list and their rights to bid, to the extended operation of route 62, San Francisco-Portland-Seattle.

I have had a series of meetings with all of our pilots, three different meetings, in order to meet with everybody in the flight department, and have gone over this whole thing carefully with them, and explained that if the Board granted our extension of route 63 to Seattle, that was our intention.

There was no question raised about that program in the event that the Board granted that extension.

The Board yesterday did grant it, so I assume that takes care of your question.

Q. In other words, there are more or less guarantees.

A. That is true, and as a matter of fact, we will need more flight crews than the 14. [271]

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1951

No. 12867

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN AIR LINES, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent,

BRIEF OF INTERVENING RESPONDENT BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

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FILED

OCT 1 - 1951

PAUL P. O'BRIEN, CLERK

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BASIS OF JURISDICTION

1. Jurisdiction of Civil Aeronautics Board.

The jurisdiction of the Civil Aeronautics Board, in the proceeding now before this Court for review, was predicated upon Sections 401, 408, and 412 of the Civil Aeronautics Act, as amended (49 U.S.C., Section 481, 488 and 492; 52 Stat. 987, 1001, and 1004), requiring approval of the Civil Aeronautics Board with respect to certain specified activities and transactions in connection with air transportation, including the issuance and transfer of certificates of authority to engage in air transportation (Sec. 401 (i)), the consolidation or merger, or purchase, of air carrier properties (Sec. 408 (a) and (b)), and certain specified contracts or agreements between air carriers (Sec.

412 (a) and (b)). In this case the petitioner herein, Western Air Lines, Inc., and United Air Lines, Inc., joined in seeking the Board's approval, under the foregoing provisions, of a transaction whereby, pursuant to a written contract between them, Western's certificate of authority to engage in air transportation over its Route 68, between Los Angeles and Denver, would be sold and transferred to United, together with certain related physical properties.

2. Jurisdiction of this Court.

The petitioner predicates jurisdiction of this Court upon Section 1006 of the Civil Aeronautics Act (49 U.S.C., Sec. 646, 52 Stat. 1024) and Section 10 of the Administrative Procedure Act (5 U.S.C., Sec. 1009, 60 Stat. 243). Section 1006 of the Civil Aeronautics Act prescribes a complete procedure for review of the orders of the Civil Aeronautics Board. Section 10 of the Administrative Procedure Act provides that "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute . . .", except in cases of ". . . the absence or inadequacy thereof . . ." It is not contended by the petitioner that the "special statutory review proceeding" prescribed by Section 1006 of the Civil Aeronautics Act is inadequate.

STATEMENT OF THE CASE

With a few exceptions, the Statement of the Case contained at pages 2-8 of the petitioner's brief constitutes a fairly complete and accurate summary of the proceedings before the Board. The exceptions to which we have reference relate mainly to petitioner's chronology of the events of the case. That chronology should be supplemented as follows:

August 25, 1947. The Board's original order noted at page 4 of petitioner's brief, omitted any conditions for the protection of employees, the Board indicating in its opinion accompanying the order that this omission was being made in the light of testimony by Western's president that no employees would be adversely affected by the route transfer. (R. 97-98.)

September 29, 1947. In answering the petitions of the Air Line Pilots Association and the Airline Mechanics Division, U.A.W.-C.I.O., for reconsideration of the Board's original order, Public Counsel recommended that before passing upon these petitions the Board should "request the parties—Western, United, A.L.P.A., the Brotherhood, U.A.W., and any other representatives of the employees—to endeavor to work out for presentation to the Board and incorporation in an amended order an arrangement for the protection of Western's displaced employees", and that failing such a voluntary agreement, the Board should then "order a further hearing on the subject of what conditions, if any, should be imposed for the protection of such displaced employees." (R. 228.)

December 5, 1947. In a conference attended by all of the interested parties, the Board recommended that the parties attempt to agree upon a satisfactory arrangement for the protection of employees of Western who were adversely affected by the transfer of Route 68 to United. (R. 246.)

In accordance with this recommendation, the parties subsequently held several conferences; but on each such occasion Western refused to give serious consideration to the development of a fair and equitable basis or formula

for employee protection, and instead continued to maintain that no employees would be adversely affected, and to demand proof of the precise incidence and extent of adverse effect of the transaction upon each and every employee, as a prerequisite to discussion of the type of employee protection to be afforded. (R. 683, 709.) Finally, the parties advised the Board of the failure of efforts to work out any voluntary agreement (R. 246-247), and the Board's order of August 25, 1948, reopening the proceedings on the question of employee protection, ensued.

As supplemented by the items to which we have directed attention, petitioner's Statement of the Case sufficiently points up the issues argued in the brief filed by the petitioner. The Statement is, however, silent as to the particular conditions for employee protection which were embodied in the Board's opinion and Order Number E-4444, dated July 7, 1950, (R. 815-847), as modified by the clarifying Order No. E-4987, dated December 29, 1950, (R. 861-872). Nor is there any reference to the evidence upon which the Board concluded that conditions for the protection of employees who might be adversely affected by the transaction between Western and United were necessary and desirable and should be imposed in this case.

Such information, relating to what might loosely be termed "the merits of the case", does not of course bear directly upon any of the points argued in Western's brief, as enumerated at pages 8 and 9 under the headings "Questions Involved" and "Specification of Errors". For this reason, we will not burden the Court with any lengthy review of the evidence adduced in the proceedings before the Board. Some reference will, however, be made to these matters in the course of our argument herein, for the rea-

son that neither petitioner's brief[1] nor its Statement of Points, etc., filed with the Petition for Review herein (R. 883) indicates a complete abandonment of this point.

QUESTIONS INVOLVED

Although five separate questions are stated and argued in petitioner's brief, it seems to us that there are only three major questions involved in this appeal, and that the additional points urged by Western are subordinate to one or another of these three basic issues. Thus the principal questions involved, and the subordinate issues, including those raised by the petitioner, are as follows:

I. Does the Civil Aeronautics Board possess the authority to impose, as conditions of its approval of transactions of the sort here involved, requirements for the protection of employees who may be adversely affected by such transactions?

II. Were the conditions imposed in this case for the protection of employees fair and reasonable, and justified by the facts of this case?

A. Was this an appropriate case for the imposition of protective conditions for employees?

B. Were the particular conditions imposed fair and reasonable?

1. The arbitration features of the conditions.

2. Failure to require United to contribute to cost of protecting Western's employees.

[1]The following statement appears at page 30 of petitioner's brief:

"The record in the reopened proceeding would support, if, in fact, it did not compel, a finding that the employees of Western were not adversely affected by the transfer of the route, but since the force of the other points urged by Western make it unnecessary to impose upon this Court the burden of weighing the evidence that point will not be urged *in this opening brief*."

III. Did the Board act properly in the procedural or formal aspects of the proceedings below?

A. Reopening and reconsideration of the case with respect to the question of employee protection.

B. Delay in processing after reopening.

SUMMARY OF ARGUMENT

I. THE BOARD POSSESSED AUTHORITY TO IMPOSE CONDITIONS FOR THE PROTECTION OF EMPLOYEES.

Under Sections 401 (i), 408 (b) and 412 (b) of the Civil Aeronautics Act, transactions of the sort here involved may be approved only if the Board finds them to be "consistent with the public interest", and the Board is expressly authorized to grant its approval "upon such terms and conditions as it shall find to be just and reasonable". The Board's statutory authority thus is phrased in language almost identical with that which the Supreme Court has construed as authorizing the imposition, by the Interstate Commerce Commission, of conditions for the protection of railroad employees in connection with similar transactions between rail carriers. In so holding, the Court recognized a direct relationship between the welfare and morale of employees and the public interest which Congress had sought to protect. The same considerations of public interest in the maintenance of an efficient and uninterrupted system of transportation are present in the railroad and airline industries. Labor relations in both industries have been subjected by Congress to the same statute, the Railway Labor Act. And employee welfare and morale is of equal or greater importance to the safety and efficiency of air transportation, and is fully as apt to be affected by job displacement as is the welfare and morale of railroad employees.

II. THE EMPLOYEE PROTECTIVE CONDITIONS IMPOSED BY THE BOARD WERE FAIR AND REASONABLE, AND JUSTIFIED BY THE FACTS OF THIS CASE.

A. This was an appropriate case for the imposition of employee protective conditions.

Western has refrained from presenting any argument on this point, although it still maintains that its employees were not adversely affected by the transaction involved. Actually the evidence presented to the Board, and the testimony of Western's own witnesses, establishes beyond question that numerous employees of Western were adversely affected. Western throughout these proceedings appears to have labored under the misapprehension that the need for protective conditions can be obviated by readjustment of the employment situation of persons immediately displaced by the route transfer, irrespective of the impact of that readjustment upon other employees; and that such transposition of the adverse effect from one group of employees to another constitutes *absence* of adverse effect. The financial benefits of the transaction in question were enjoyed by Western to the detriment of the employees ultimately displaced as a result thereof.

B. The protective conditions imposed by the Board were fair and reasonable insofar as Western is concerned.

The conditions imposed are less favorable to the employees, and impose less of a burden upon Western, than conditions imposed in numerous similar transactions over a period of years by the Interstate Commerce Commission, and which have been upheld by the Supreme Court. They are less favorable to the employees, and less burdensome to Western, than similar conditions recognized as fair and reasonable by mutual agreement (the Washington Agreement of 1936) between representatives of management and

labor on most of the major railroads in the United States. Consideration of the details of the conditions prescribed by the Board reveals the extremely limited and partial nature of the compensation afforded to employees for the detriment suffered by them in order that Western might enjoy the financial benefits of the transaction in question.

1. Arbitration features of the conditions.

The Board did not delegate to arbitrators its function of fixing the conditions for the protection of employees, or determining whether the conditions imposed were fair and reasonable. The Board itself prescribed a complete formula for the protection of employees, leaving to the parties, or to arbitrators only in the event of disagreement by the parties, the purely ministerial function of applying that formula to the situation developing as a result of the route transfer. All discretion in the matter was retained by the Board. In its final order the Board retained jurisdiction of the proceeding for purposes broad enough to include the review of findings by the arbitrators. Any action or inaction by the Board on a request to review the arbitrators' findings would be as much subject to review by this Court as any other order of the Board.

2. Failure to require United to contribute to cost of protecting Western's employees.

On the facts of the instant case, it is of little moment to the employees on whose behalf this brief is filed whether Western, United, or both, bear whatever cost may be involved in the application of the protective conditions imposed by the Board. In the exercise of its discretion, the Board determined that in this case it was not unjust or unreasonable to require Western to bear this cost. While we believe there is nothing in the facts of this case to support the contention that the Board abused its discretion in this

particular, argument on this point, involving a fairly detailed review of the factual situation herein, will be left to the parties directly interested.

III. THE BOARD'S CONDUCT OF THE PROCEEDINGS BELOW WAS PROPER AND LAWFUL.

A. Reopening and reconsideraton of the case with respect to the question of employee protection.

The case was reopened by the Board, on the question of employee protection, upon petitions for reconsideration duly filed in accordance with the published rules and regulations of the Board. The Board's original order approved the consummation of the route transfer on a date prior to the expiration of the prescribed time for seeking reconsideration solely as a matter of convenience and economy to Western, in the light of the provisions of its contract with United. If Western proceeded on the assumption that reconsideration of employee protection would not be sought, or if sought would be denied by the Board, it did so at its own peril.

Omission of conditions for the protection of employees from the Board's original order was the direct result of Western's representations to the Board as to the absence of adverse effect upon employees. Western's actions between the date of the original order, and the expiration of the period within which reconsideration might be sought under the Board's rules, belied its previous representations to the Board, and constituted new evidence of adverse effect which alone would have supported reconsideration.

Within 10 days from the date of consummation of the route transfer, Western knew that the question of employee protection was again before the Board, but neither then nor subsequently did it ask the Board to restore the status quo pending determination of this question.

In effect, Western is contending that by accelerating the date for putting its orders into effect, the Board could in every case foreclose parties wishing to challenge the orders from seeking reconsideration or pursuing their rights of appeal. Such a contention is clearly untenable.

B. Delay in processing after reopening.

At no time did Western interpose any objections to delay in the reopened proceedings before the Board. Had it wished to accelerate those proceedings, and had the Board on request refused to do so, ample remedies would have been available to Western under the Administrative Procedure Act to which it has referred so extensively in its brief. Section 1006 of the Civil Aeronautics Act, under which this review proceeding is brought, prohibits consideration of objections not urged before the Board.

It has never, to our knowledge, been held that delay in the conduct of a proceeding could wipe out the substantive rights of the parties. But Western is here asserting delay on the part of the Board as a means of denying its employees the benefit of the protective conditions imposed. The only remedy for such delay is one which Western refrained from pursuing, i.e., an action in the nature of mandamus against the Board, such as the action expressly authorized by Section 10 (e) of the Administrative Procedure Act to "compel agency action unlawfully withheld or unreasonably delayed".

ARGUMENT

I. THE BOARD POSSESSED AUTHORITY TO IMPOSE CONDITIONS FOR THE PROECTION OF EMPLOYEES.

The sections of the Civil Aeronautics Act under which Western and United sought Board approval of the sale and transfer of the former's Route 68, contain the following provisions which are material to this portion of our discussion:

Sec. 401 (49 U.S.C., Sec. 481).

"(i) No certificate may be transferred unless such transfer is approved by the Board as being *consistent with the public interest.*" (Emphasis supplied.)

Sec. 408 (49 U.S.C., Sec. 488).

"(b) . . . Unless . . . the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be *consistent with the public interest* or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, *upon such terms and conditions as it shall find to be just and reasonable* and with such modifications as it may prescribe. . . ." (Emphasis supplied.)

Sec. 412 (49 U.S.C., Sec. 492).

"(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be *adverse to the public interest,* or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be *adverse to the public interest,* or in violation of this Act. . . ." (Emphasis supplied.)

It is clear from the foregoing that the Board was authorized to incorporate in any order approving the transaction here involved, such terms and conditions as it found

to be just and reasonable and in the public interest. This gives rise to the question of whether adverse effect which may result to employees because of such a transaction should be considered by the Board as a part of the public interest which it is required to protect.

This question was thoroughly explored in the railroad industry in the interpretation of a substantially identical provision of the Interstate Commerce Act. Section 5 (4) (b) of that Act, as it was phrased prior to amendment by the Transportation Act of 1940,[2] provided in part as follows:

> "If . . . the Commission finds that subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable."

It will be noted from the foregoing language that the Interstate Commerce Commission, like the Board, was empowered in its orders approving consolidations, mergers, operating contracts, or other acquisitions of control, to impose such terms and conditions as it found to be just and reasonable in the public interest. Thus the Commission had

[2]Reference is made to the Interstate Commerce Act provision as it existed prior to the amendments of 1940 for the reason that after 1940 the statute imposed a mandatory duty upon the Commission to protect employees adversely affected by unification transactions, whereas such protection was discretionary prior to 1940, as it is today under the Civil Aeronautics Act.

Similarly, in 1943 Congress added mandatory provisions to the Federal Communications Act for the protection of employees of telegraph carriers adversely affected by consolidation transactions, 47 U.S.C. Sec. 222 (f).

before it prior to 1940 the identical question presented here, i.e., is employee protection a part of the public interest which should be protected by just and reasonable conditions?

There can be little doubt that it was the intention of Congress to confer upon this Board, insofar as Section 408 proceedings are concerned, the same authority in the field of air transportation as had been granted to the Interstate Commerce Commission in the railroad industry under Section 5 of the Interstate Commerce Act. Not only was the language of Section 408 (b) of the Civil Aeronautics Act modeled from the language of Section 5 (4) (b) of the Interstate Commerce Act, but when the measure was before Congress, Senator Truman observed:

> "Insofar as consolidations are concerned they are left to the Authority which would have a power similar to that exercised by the Interstate Commerce Commission in connection with the consolidation of railroads."[3]

Accordingly, the established interpretation of Section 5 (4) (b) of the Interstate Commerce Act on the question of employee protection should be given considerable weight by the Court in determining Congressional policy under Section 408 (b) of the Civil Aeronautics Act. Proper construction of Section 5 (4) (b) of the Interstate Commerce Act was established by the Supreme Court of the United States in *United States v. Lowden,* 308 U.S. 225. That case involved the consolidation of two railroad properties by the lease of one of the properties to the company operating the other. The Interstate Commerce Commission imposed comprehensive conditions for employee protection, and in upholding the Commission's right to impose such conditions, the Court said:

[3]83 Cong. Rec. 6728.

"The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored. . ." (pp. 235-236.)

". . . we do not doubt that Congress, by its choice of the broad language of Sec. 5 (4) (b) intended at least to permit the Commission, in authorizing railroad consolidations and leases, to impose upon carriers conditions related, as these are, to the public policy of the Transportation Act to facilitate railroad consolidation, and to promote the adequacy and efficiency of the railroad transportation system." (p. 238.)

"If we are right in our conclusion that the statute is a permissible regulation of interstate commerce, the exercise of that power to foster, protect and control the commerce with proper regard for the welfare of those who are immediately concerned in it, as well as the public at large, is undoubted. . . . Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the costs of performance of its carrier dutes, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege. That was determined in Dayton-Goose Creek R. Co. v. United States, 263 U.S. 456, 68 L. Ed. 388, 44 S. Ct. 169, 33 A.L.R. 472, supra. There it was held that the Fifth Amendment does not forbid the compulsory application of income, attributable to a privilege enjoyed by a railroad as a result of Commission action, to specified purposes 'in furtherance of the public interest in railway transportation.' Section 422 (10), Transportation Act, 41 Stat. at L. 490, chap. 91, 49 U.S.C.A. Sec. 15a. Moreover we cannot say that this limited and special application of the principle, fully recognized

in our cases sustaining workmen's compensation acts, that a business may be required to carry the burden of employee wastage incident to its operation, infringes due process. . . ." (p. 240.)

The fact that protection of employees in consolidation and acquisition cases under the Interstate Commerce Act was made mandatory by Congress in the Transportation Act of 1940[4] does not detract from the applicability of its practice and policy on employee protection where the power to impose such conditions is discretionary. As the Supreme Court observed in the *Lowden* case in noting the pendency of proposed legislation not then enacted which finally resulted in the mandatory provision for employee protection above cited (308 U.S. at 239):

> "The fact that a bill has recently been introduced in Congress and approved by both houses, requiring as a matter of national railway transportation policy the protection of employees such as the Commission has given here, does not militate against this conclusion. Doubts which the Commission at one time entertained, but later resolved in favor of its authority to impose the conditions, were followed by the recommendation of the Committee of Six that fair and equitable arrangements for the protection of employees be

[4]Section 5 (2) (f) of the Interstate Commerce Act, 49 U.S.C. Sec. 5 (2) (f) provides:

"As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

> 'required'. It was this recommendation which was embodied in the new legislation. Sen. Rep. No. 433, 76th Cong. 1st Sess., p. 29. *We think the only effect of this action was to give legislative emphasis to a policy and a practice already recognized by Sec.* 5 (4) (*b*) *by making the practice mandatory instead of discretionary, as it had been under the earlier act.*" (Emphasis supplied.)

Moreover, in abandonment cases under the Interstate Commerce Act where protective conditions for employees are not mandatory, the Commission regularly provides the same type of protection today as it affords under the merger and consolidation section of the Act. In this connection, it is interesting to note that while the Commission concluded that terms and conditions for the protection of employees were within its discretionary powers in consolidation proceedings under Section 5 (4) (b), it originally concluded that it did not have such authority in abandonment cases under Section 1 (20) of the Interstate Commerce Act (49 U.S.C., Sec. 1 (20)). In reaching this conclusion, the Commission reasoned that the conditions which it was authorized to impose under the consolidation section—"just and reasonable" conditions which "will promote the public interest"—were of much broader scope than the conditions it is authorized to impose under the abandonment section—conditions which "the public convenience and necessity may require". The Supreme Court of the United States reversed the Commission in this construction of the statute, and found that it did possess the authority to protect employees adversely affected by abandonments, in *Interstate Commerce Commission v. Railway Labor Executives' Association,* 315 U.S. 373. In doing so the Court observed (p. 377):

> "And if national interests are to be considered in connection with an abandonment, there is nothing in the Act to indicate that the national interest in purely

financial stability is to be determinative while the national interest in the stability of the labor supply available to the railroads is to be disregarded. On the contrary, the *Lowden Case* recognizes that the unstabilizing effects of displacing labor without protection might be prejudicial to the orderly and efficient operation of the national railroad system. Such possible unstabilizing effects on the national railroad system are no smaller in the case of an abandonment like the one before us than in a consolidation case like that involved in the *Lowden Case*. Hence, it is only by excluding considerations of national policy with respect to the transportation system from the scope of 'public convenience and necessity', an exclusion inconsistent with the Act as this Court has interpreted it, that the distinction made by the Commission can be maintained."

The foregoing considerations require the conclusion that under the Civil Aeronautics Act, the Board has the same power to impose terms and conditions for the protection of employees as that exercised by the Interstate Commerce Commission and sustained by the Supreme Court in the *Lowden* and *Railway Labor Executives' Association* cases. The authority of the Board and the Commission is prescribed in almost identical statutory language; the same considerations of national interest in the stability and efficient operation of transportation are equally present in the rail and air industries; Congress has found it desirable to place both rail and air transportation under the Railway Labor Act and thus regards them, apart from other modes of transportation, as coordinate in terms of labor-management relations; and finally, it goes without saying that employee welfare and morale is of equal or greater importance to the safety and efficiency of air transportation, and fully as apt to be affected by job displacement, as is the welfare and morale of railroad employees.

Petitioner has advanced no argument why the reason-

ing of the Supreme Court's holdings with respect to the power of the Interstate Commerce Commission is not equally applicable to the question of the authority of the Civil Aeronautics Board in this case, except to attempt to differentiate Congressional intent with respect to the two industries on the ground that general economic conditions confronting the railroads during the depression were different from those prevailing in the airline industry today. This argument of course ignores the facts that the Commission's authority to grant employee protection in transactions of this sort not only did not end with the depression, but has been regularly exercised to this day; that in enacting the Transportation Act of 1940, Congress not only did not diminish the Commission's authority, but added affirmitive guarantees of employee protection (49 U.S.C., Sec. 5 (2) (f)); and that the need and desirability of preserving employee welfare and morale by granting some measure of protection in such cases is no more transitory than is the public interest in the maintenance of an adequate, safe and efficient transportation service.

It is of course true that in the early 1930's, the impact of railroad consolidations upon employees in depression times was so severe as to call for more stringent legislative measures than would be required on a permanent basis. Indeed, such legislation was forthcoming, in the form of the Emergency Transportation Act of 1933 (48 Stat. 211). But it was not this temporary legislation, but rather the permanent statutory provisions, which the Supreme Court in the *Lowden* and *Railway Labor Executives' Association* cases found to support the power to grant employee protection. Thus, as the Court said in the more recent case of *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950), in reviewing the legislative history of the Commission's authority to grant employee protection:

> ". . . In the Emergency Transportation Act of 1933, 48 Stat. 211, Ch. 91, there were many temporary

provisions which originally were to expire in 1934 and finally did expire in 1936. Among these was Section 7 (b). It provided that no employee was to be deprived of employment or be in a worse position with respect to his job by reason of any action taken pursuant to the authority conferred by the Act. *That provision, on a temporary and independent basis, thus coexisted with the permanent amendments which were then made to Section 5 of the Interstate Commerce Act,* including Section 5 (4) (b)." (339 U.S. 15, footnote 13; emphasis supplied.)

And finally, we are at a complete loss to see the logic of Western's contention that the burden of protective conditions should not be placed upon the airlines, which Western describes as being so thriving and having such a bright future, while such burden should be placed upon the railroads which are described as "brinking on insipient [sic] deterioration". Surely the loss of his job is as serious to an employee in one industry as in the other; and if either industry were to be exempted from alleviating such hardship of its employees, certainly the one least able, not best able, to pay should be exempted.

II. THE EMPLOYEE PROTECTIVE CONDITIONS IMPOSED BY THE BOARD WERE FAIR AND REASONABLE, AND JUSTIFIED BY THE FACTS OF THIS CASE.

A. This was an appropriate case for the imposition of employee protective conditions.

Throughout the Board proceedings, Western's position on this point was that protective conditions should not be imposed for the reason that none of its employees would be adversely affected by the route transfer. In its brief filed with this Court, Western has failed to present any argument along these lines. But as we have pointed out, it still does not appear to have abandoned its former con-

tention; and for that reason we feel that some brief reference should be made to the facts clearly establishing the adverse effect of this transaction upon Western's employees.

In the proceedings before the Board, no attempt was made to demonstrate the precise incidence and extent, in monetary terms, of the effect of the route transfer upon Western's employees. The record is, however, replete with evidence of substantial adverse effect of this transaction upon numerous employees, justifying the application of a formula for employee protection such as that embodied in the Board's final order.

We have pointed out that Western, though not arguing the point, still maintains that no employees were adversely affected. Because this position of Western seems to be based not on any attempt to refute the evidence of adverse effect here, but rather on a basic misapprehension as to what constitutes adverse effect for which employees should, in the public interest, be compensated, we shall not undertake any lengthy process of reviewing the evidence. We shall instead refer briefly to portions of the record clearly establishing that employees were adversely affected, and will then discuss what appears to us to be the basic fallacy in Western's approach to the question.

Lengthy testimony on this question appears in the record, numerous witnesses having testified for both the labor organizations and for Western; but the exhibits introduced by the Air Line Pilots Association (R. 771-796) and the Brotherhood (R. 797-805) amply demonstrate that numerous pilots and ground personnel were furloughed or dismissed as a direct result of the route transfer, and that most of these employees not only incurred out of pocket expenses in effecting readjustment of their employment situation, but were unable to obtain other positions, with West-

ern or elsewhere, in which their compensation equalled what they would have earned had the route transfer not occurred.

But to truly appreciate the impact of this transaction upon Western's employees, it is necessary to look beyond the group formerly employed on Route 68. Under the seniority systems in effect among Western's employees, individuals directly displaced as a result of the termination of the Route 68 operations in turn displaced other employees at widely scattered points on Western's system, thus setting up a chain reaction resulting in the ultimate loss of jobs by employees who had never worked on the Route 68 operations at all. Such employees are the real beneficiaries of a protective formula such as that imposed by the Board; and the fact that they were displaced indirectly instead of directly does not make the adverse effect upon them any the less the result of the transaction here involved, or obliterate the public interest requiring their protection as displaced employees.

Western's basic misapprehension throughout appears to have been that the only employees with whom the Board should concern itself were those directly employed on Route 68, and immediately displaced by the cessation of operations over that route. Since many of those employees were able to obtain other positions through exercise of their seniority rights, Western argued that the transaction involved no adverse effect upon employees.

It is of course conceivable that a company engaged in an over-all program of expansion could terminate one aspect of its operations and still absorb all of the displaced employees without having to discharge anyone else. But this was not Western's situation. Rather, it appears that at the time of the route transfer, and at all times since, Western has been engaged in an overall program of *reduc-*

ing its personnel. This is well illustrated by the testimony of Mr. Arthur F. Kelly, Western's Vice President of Traffic and former Executive Assistant to its President, appearing at pages 682-683 of the Record. In discussing this general reduction of personnel, Mr. Kelly said:

> "It can be further added that the cutback started when Mr. Drinkwater came with Western Airlines beginning January 1, 1947, and it is continuing."

Indeed, this one fact alone, coupled with the fact that the transaction in this case involved a complete cessation of Western's operations over an 878 mile air route between two major traffic centers, the sale of the equipment used to operate the route, and the termination of the positions of employees engaged in the discontinued operation, is all that is needed to conclusively establish adverse effect upon employees, leaving only the questions of the identity of the employees ultimately affected and the amount of their financial loss.

Western's attitude on this whole question, to the effect that if the employees who had been working on Route 68 could get other jobs on the system by exercising their seniority rights, no adverse effect was involved, is illustrated by the following testimony of Mr. Kelly:

> "*We acknowledge the fact that people were affected by the sale of Route* 68. The question at issue is whether these people were adversely affected. In transposing people from other route sections they would be affected. How they were adversely affected, is a question. In the case of ground personnel, *we did everything we could to see that they were able to exercise their seniority right.*" (R. 699; emphasis supplied.)

The sale of Route 68 was a very profitable transaction for Western, so much so, indeed, that former Chairman

Landis of the Civil Aeronautics Board found it necessary to dissent (R. 132-184) from the original order of approval on the sole ground that the purchase price for the route exceeded Western's investment by approximately $1,500,000. (R. 181-182.) Western's president stated that the transaction was a sound thing for Western, improved its financial condition, and was not a forced sale. (R. 26.)

Under these circumstances, and with a clear showing of adverse effect upon employees, we submit that this case is unquestionably an appropriate one for the imposition of conditions for the protection of employees, and that it would be completely inequitable to allow Western to reap the full benefits of this transaction without requiring at least a partial compensation of the employees to whose detriment the benefits were achieved.

B. The protective conditions imposed by the Board were fair and reasonable insofar as Western is concerned.

In our approach to the question of whether the particular conditions for the protection of employees imposed by the Board in this case are fair and reasonable, it is understandable that we should refer again to the railroad industry. We have previously pointed out that the same considerations of public interest in adequate, stable, and efficient transportation through preservation of employee welfare and morale are present in equal degree in the rail and air industries; that the authority of both the Board and the Interstate Commerce Commission to impose conditions for the protection of employees arises from almost identical statutory provisions; and that the intimate relationship between the employee problems of the air industry and those of the rail industry is further evidenced by the fact that Congress has seen fit to cover employer-employee relationships in both industries under the Railway Labor Act. For these reasons, it seems apparent to us that the nature of the

adverse effect on employees resulting from carrier acquisitions will generally be the same in both rail and air transportation. Accordingly, a formula of conditions which is well established and has stood the test of practical experience in the rail industry seems a logical and desirable one for utilization by the Board.

The conditions for the protection of employees imposed by the Board in this case (R. 843-847), as amended by the Board's final order in the proceedings below (R. 868-872), are taken in large measure from the so-called "Burlington" formula, which the Brotherhood asked the Board to adopt in this case. (See R. 797-803 for the proposed Burlington conditions.) The Board's conditions differ substantially from the Burlington conditions only in that they (1) provide a two-year instead of four-year "protective period" for Western's employees; (2) fail to provide any compensation for losses sustained as a result of forced sale of a home or cancellation of leases or land contracts of employees compelled to change their place of residence; and (3) fail to protect non-salary benefits attached to the previous employment, such as free transportation, pensions, hospitalization, relief, etc. These differences, of course, simply result in the Board's conditions being considerably less favorable to the employees, and more favorable to Western, than the Burlington conditions.

The Burlington formula derives its name from an abandonment case decided by the Interstate Commerce Commission (*Chicago, Burlington & Quincy Abandonment,* 257 I.C.C. 700) in which the Commission, exercising discretionary power under Section 1 (20) of the Interstate Commerce Act, provided terms and conditions for the protection of employees adversely affected by the abandonment substantially identical to those which it prescribes in consolidation cases under the mandatory provisions of Section 5 (2) (f) of the Interstate Commerce Act.

The formula of conditions provided in the "Burlington" case grew out of the Washington Agreement of 1936, sometimes referred to as the Washington Job Protection Agreement. This agreement resulted from conferences held between representatives of the Railway Labor Executives' Association, an association composed of the various standard railway labor organizations representing the great majority of railroad employees in the United States, and the American Association of Railroads, an organization composed of the presidents of approximately all class I railroads. These conferences were held for the purpose of negotiating a national agreement which would give to railroad employees specific protection in what are generally referred to as coordination cases subject to approval by the Interstate Commerce Commission.

The Washington Agreement was entered into in May, 1936. Its terms resulted from the knowledge and experience of practical transportation men from both labor and management and represented their best judgment as to a fair and workable basis of protection for employees adversely affected by consolidation transactions. The agreement was utilized by the Interstate Commerce Commission in *Chicago, Rock Island and Gulf Railway Trustees' Lease,* 230 I.C.C. 181, a case decided by the Commission under Section 5 (4) (b) of the Interstate Commerce Act, where its powers were identical in all respects to those vested in the Civil Aeronautics Board by Section 408 (b) of the Civil Aeronautics Act. The Commission's decision in this case was approved by the Supreme Court of the United States in *United States v. Lowden,* 308 U.S. 225, discussed in part I of this brief.

When the Transportation Act of 1940 was enacted, it contained in substance a provision which called for continued authority by the Commission to apply the terms of the Washington Agreement and also a further paragraph

requiring that no employee of a railroad affected by an order of the Commission providing for consolidation and unification shall be in a worse position with respect to his employment or compensation or conditions of work for a period of four years following the effective date of the order of the Interstate Commerce Commission approving the transaction, provided that no employee would be protected for a period of time exceeding his length of service with the railroad. (49 U.S.C., Sec. 5 (2) (f)).

Accordingly, after 1940 the Commission provided a formula of protection for employees which was based in major part on the terms of the Washington Agreement, but which differed from that agreement in two respects. First, the period of protection is for a maximum of four years instead of five. Second, in the case of separations or furloughs, the employee receives his full wage rate up to a maximum of four years instead of receiving 60% of his previous compensation. Although it is the mandatory provisions of Sections 5 (2) (f) of the Interstate Commerce Act which call for such a formula,[5] the Commission has applied the same formula in abandonment cases where its authority is discretionary. It was from such a decision that the "Burlington" formula emerged.[6] Today this formula is recognized as an established pattern for employee protection in abandonment cases. Since the Commission in imposing this formula is exercising the same discretionary authority to provide employee protective conditions as the Board possesses under Section 408 (b) of the Civil Aeronautics Act, we proposed its adoption by the Board in this proceeding.

We have pointed out that the employee protective conditions imposed by the Board are less stringent from West-

[5]Oklahoma Railway Company Trustees' Abandonment, 257 I.C.C. 177.

[6]Chicago, Burlington & Quincy Railroad Abandonment, 257 I.C.C. 700, 704-706.

ern's point of view than those which have been recognized as fair and reasonable by both management and labor on most of the country's railroads, by the Interstate Commerce Commission, and by Congress, and which have been upheld by several decisions of the Supreme Court. In view of this history, and Western's failure to even argue the question of fairness or reasonableness of the conditions, little purpose would be served by a discussion of each separate provision of the Board's conditions.

Western's attitude throughout has been simply that no conditions at all should be imposed. It was unwilling, throughout the Board proceedings, even to attempt to analyze the Burlington formula (R. 683), much less to enter into negotiations with representatives of its employees on the question of a fair and reasonable formula for employee protection. (R. 709-710). It did not want to be "saddled by what we might call additional unemployment insurance" (R. 686) or "hamstrung by formulas" (R. 710). It apparently felt that its employees should necessarily be held to have assumed the possibility of displacement as "one of the risks in working for the airline industry", and should not be given "charity" in the form of employee protective conditions in these transactions. (R. 711.) Such a philosophy, while it may explain Western's uncompromising position in this case, in no way militates against the conclusion that in the light of the established national policy supporting employee protection in transactions of this sort, the particular conditions imposed by the Board in this case are entirely fair and reasonable insofar as Western is concerned.

1. Arbitration features of the conditions.

As has been done by the Interstate Commerce Commission in imposing protective conditions approved by the

Supreme Court, the Board in this case refrained from undertaking to pass upon each and every claim of adversely affected employees, leaving such matters to agreement of the parties or, in cases of disagreement, to arbitration. The Board definitely did not, however, as contended by Western at page 32 of its brief, delegate to arbitration its functions of fixing the conditions and determining whether they were just and reasonable. Instead it prescribed a complete formula for the determination of employee claims, leaving to arbitration, if necessary, only the purely ministerial function of applying the formula to the facts in each employee's case.

Such an arrangement is, of course, the only practicable method of handling claims of individual employees in cases of this sort. To require the Board to conduct formal hearings and receive evidence as to the effect of the route transfer on each individual employee, to enter findings as to all of the displacements, transfers, wage loses, transportation expenses, seniority rights and the manner of their exercise, earnings in outside employment, etc., for all of the individuals formerly employed on Route 68, and all of the employees displaced by the series of transfers precipitated by each of the Route 68 employees exercising his seniority displacement rights, would be to burden the Board with such a time-consuming mass of detail in cases of this sort as to render it completely incapable of fulfilling its statutory duties. Moreover, we cannot believe that Western, any more than the Board or the other parties to this proceeding, would wish to assume the great expense and effort of submitting such details to the Board by testimony and documentary evidence in formal hearings.

Aside from these considerations, however, we think it is clear that Western's fears of being bound by an "unconscionable arbitration award" are completely unjustified. As condition No. 12 of the employee protective conditions

embodied in its final order, as amended, the Board retained jurisdiction of the proceeding for purposes broad enough to include the review of any arbitration award. Thus, the Board stated:

> "12. The Board hereby retains jurisdiction of this proceeding for the purpose of modifying or clarifying any provision of this order and for the purpose of imposing from time to time such other or further terms and conditions as to the Board may seem just and reasonable." (R. 847.)

Moreover, if in such a situation as Western envisions the Board should refuse to review an arbitration award, such refusal of the Board would be as subject to review by this Court as any other action taken by it, under the following provision of Section 1006 of the Civil Aeronautics Act:

> "(a) Any order, *affirmative or negative,* issued by the Board under this Act . . . shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia . . ." (49 U.S.C., Sec. 646 (a); emphasis supplied.)

2. Failure to require United to contribute to the cost of protecting Western's employees.

It is of course of little interest to the employees adversely affected by this transaction whether the cost of compensating them under the protective conditions imposed by the Board is borne by Western, United or both. Therefore we refrain from presenting any argument on this point, and simply state as our position that we believe the matter of allocating the costs of protective conditions to be within the discretion of the Board on the facts of each particular case, and that we do not think there is anything in

the record to justify the conclusion that the Board abused its discretion in this case.

It should perhaps be mentioned that while Western has sought a decree of this Court requiring the complete elimination of employee protective conditions, such a decree would not be justified even if the Court did conclude that the Board had acted improperly in this matter of allocation of costs, or in the inclusion of the arbitration provisions discussed above. These points relate not to the question of whether *any* protective conditions should have been imposed, but rather to the question of whether the *particular* conditions adopted by the Board may be permitted to stand. A finding in favor of Western's contentions on either of these points would thus justify no more than a decree remanding the case to the Board for revision of the conditions imposed.

III. THE BOARD'S CONDUCT OF THE PROCEEDINGS BELOW WAS PROPER AND LAWFUL.

In our discussion up to this point we have shown (1) that the Board possessed authority to impose conditions for the protection of employees adversely affected by transactions of the sort here involved; (2) that this was an appropriate case for the exercise of that authority; and (3) that the conditions which the Board did impose were fair and reasonable and in the public interest. There remains for consideration only the contention of the petitioner that in spite of all this, the Board's action must be reversed and the conditions completely eliminated because (1) the conditions were imposed as the result of reconsideration of the case after the Board had originally approved the transaction and permitted its consummation, and (2) the Board's conduct of the proceedings on reconsideration was not speedy.

A. Reopening and reconsideration of the case with respect to the question of employee protection.

Insofar as is material to this section of our argument, the Civil Aeronautics Act provides:

> "Except as otherwise provided in this chapter, the Board is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper." (Sec. 1005 (d); 49 U.S.C., Sec. 645 (d).)

> "The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general and special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out such provisions and to exercise its powers and duties under this chapter." (Sec. 205 (a); 49 U.S.C., Sec. 425 (a).)

The Board, pursuant to this latter section, formulated and published its Rules of Practice which, as effective throughout the period in which this matter was pending before it, provided:

> "285.11 Petition for Rehearing, Reargument and Reconsideration.
>
> "(a) Parties. Any Party may petition for rehearing, reargument or reconsideration of any final order by the Board in a proceeding, or for further hearing before decision by the Board.
>
> * * * * *
>
> "(c) Such petition . . . must be filed within 30 days after service of the order sought to be vacated or modified. After the expiration of said 30 days, such a petition may be filed only by leave of the Board granted pursuant to formal application upon a showing of reasonable grounds for failure to file the petition within the prescribed 30 day period . . ."

The Board's original order, approving the route transfer without conditions for employee protection, was entered on August 25, 1947. Within 30 days after service of that order, the Air Line Pilots Association filed its petition for reconsideration on the question of employee protection, and the Airline Mechanics Division, U.A.W.-C.I.O., filed a petition for leave to intervene and a similar petition for reconsideration. Subsequently, on October 13, 1947, the Brotherhood filed its petition for reconsideration, showing as reasonable grounds for its failure to file within the 30-day period the fact that the Board's opinion and order of August 25, 1947, was never served upon it, and that it only received a copy from the Public Counsel on September 13, 1947. (R. 241.)

The Board's order of August 25th had provided for consummation of the entire transaction within 21 days of the date of that order, which would, of course, be prior to the period prescribed by the Board's rules for seeking reconsideration. In its brief, Western states that this provision "pushed" (Petitioner's brief, p. 31) it into consummating its contract with United, and categorizes the Board's supplemental order of September 11, 1947, effecting the formal changes in the certificates of Western and United necessary to permit consummation on the 21st day (September 15, 1947), as an "uncompromising mandate" (Petitioner's brief, p. 19). The fact is, of course, that the initial proceedings resulting in the Board's order of August 25, 1947, had been accelerated at Western's request. (R. 58-60.) Under its agreement with United, Western had to obtain Board approval of the transaction before September 1, 1947, or face the possible calling or commencement of interest obligations upon a $1,000,000 loan made to it by United in connection with the transaction. (R. 11-12.) Moreover, it was the contract between Western and United, and not any whim or caprice of the Board, which "pushed" Western into consummation prior to the expiration of the

period for reconsideration, the agreement expressly stating that "... the consummation of the transfer and assignment of the Certificate and other property shall take place on the 21st day following the issuance of such order of the Board." (R. 12.) Thus the Board's action, in conforming its order to the provisions of the agreement, was simply a matter of accommodation to Western.

Western's position with respect to the Board's right to reconsider ts original order of approval, after consummation of the transaction, amounts to a contention that although other parties to the Board proceedings had the right, under the Board's rules, to seek reconsideration of the original order within 30 days, or thereafter for good cause shown, such right could be obliterated by acceleration of the date of consummation of the transaction approved by the Board. And if this theory were to prevail, it would also follow that the right of such other parties to appeal to this Court could be effectively foreclosed in similar fashion; for whatever difficulties might be encountered by Western and United in undoing or modifying what had been done in consummation of the Board's original order would be no less in the case of an appeal than in the case of a reconsideration by the Board.

The fallacy of such a contention is readily apparent. And in a remarkably similar factual situation, arguments identical with those urged by Western were rejected in the case of *Falwell v. United States,* 69 F. Supp. 71 (affirmed *per curiam* 330 U.S. 807). The following statements from the court's opinion would be equally pertinent in the instant case:

> "The action of Division 4 was always, by the clear terms of the statute, subject to reconsideration by the full Commission, provided application was made therefor within the time prescribed by the rules of the Commission—which was done. . . . It is true that the order

> of Division 4 was definite in its terms of approval of the proposed transaction and in its directions to the plaintiffs. . . . But any action the plantiffs took toward carrying out the provisions of the order was, as they well knew, subject to what might happen if, as a result of reconsideration by the full Commission, the order was reversed or modified. . . ." (69 F. Supp., 74-75.)

Clearly, then, the mere fact that consummation of this transaction pursuant to the Board's original order antedated the filing of petitions for reconsideration, which were filed in accordance with the Board's rules, did not preclude the Board from reopening the proceedings for further consideration of the question of employee protection. The only question remaining to be considered is that of whether, in so doing, the Board was guilty of such an abuse of discretion as to require reversal of its order granting reconsideration, and the setting aside of its further orders issued as a result of reconsideration.

It might be said that this question has already been answered in the negative, since we have already pointed out that the facts developed on rehearing fully established the extensive adverse effect of this transaction on Western's employees, and completely justified the imposition of employee protective conditions.

Another short but equally decisive answer to the question of the propriety of the Board's action is that the petitions for reconsideration were based in part upon developments occurring subsequent to the Board's original order but before its consummation, and before expiration of the time for seeking reconsideration, which conclusively demonstrated the incorrectness of the findings upon which the Board's original order denying employee protection had been based. These developments, brought to the Board's attention by the petitions for reconsideration, consisted of Western's action in laying off numerous Route 68 employ-

ees shortly after the Board's original order. (R. 194-196; 222-223; 821.) In the face of this showing, it would have been an abuse of discretion for the Board to have denied reconsideration.

It is of course conceivable that in certain cases where the findings sought to be reconsidered were not so demonstrably erroneous, the difficulties and inconveniences that a party might be subjected to as a result of reconsideration of a transaction already consummated might weigh heavily as a factor in the Board's exercise of its discretion to deny reconsideration, even on petitions timely filed. But here the very error which so clearly justified reconsideration was also one into which the Board had been misled by reliance upon representations made by Western's officials.

In its brief Western argues that its witnesses only made "predictions", and not representations, as to the absence of adverse effect upon employees. But this was clearly not the purport of the testimony appearing in the record herein, nor did the Board so understand it.

In quoting the testimony of Mr. Drinkwater, its president, at pages 27-28 of its brief, Western conveniently stopped just short of the question and answer giving final color to the quoted testimony, i.e.:

> "Q. If you are unable to absorb any of the personnel who might be left jobless as the result of this sale, do you have any plans with respect to taking care of that personnel?
>
> "A. *Well, there won't be any.* The last question covers that. (R. 42-43.)"

And further along in his testimony, Mr. Drinkwater again unequivocally testified as to the absence of adverse effect upon employees, as follows:

"Q. With respect to any personnel that was dropped as a result of the route sale, you don't think the Board should put any restrictions on that, but you would accept them if any conditions were put in.

"A. Well, it depends on what they were, *but the question is entirely academic because there are not going to be any personnel dropped as the result of route sale.* There may be some dropped because they are incompetent, or we have too many folks, *but not any dropped because of the route sale.*" (R. 44.)

In the light of this testimony no resort to legal doctrines of estoppel is required. The Board clearly did not abuse its discretion by refusing to deny reconsideration on the basis of prior consummation of the transaction; for it was only because of these erroneous representations by Western that it had permitted the route transfer to be effected without protective conditions for employees. Whether or not any estoppel was present, there was certainly a proper balancing of the equities by the Board.

Finally, it should be pointed out that the picture painted by Western is, to say the least, distorted, when it tries to convey the impression that almost three years after initial approval of the transaction, when it had gotten itself into an inextricable position, and without "warning of the possible pendency of doom", it was shocked by the imposition of employee protective conditions.

The fact is, of course, that the issue of employee protection was introduced at the outset of the entire proceedings, and the Board's original order of approval was expressly conditioned upon its understanding that no adverse effect upon employees would result from the transaction. With this background, Western must have been aware that the lay-off notices sent to its Route 68 employ-

ees just prior to consummation of the transfer might be expected to precipitate a reconsideration. And although it cannot be maintained that Western's position had become inextricable within 9 days after the route transfer, when the first petition for reconsideration was filed, it took no steps to have the status quo restored pending disposition of this and subsequent petitions. Instead it elected to take its chances on being able to block imposition of any conditions for the protection of employees. Having failed in this endeavor, it cannot now be heard to complain that developments over a three-year period have made a rescission of its agreement with United impracticable.

B. Delay in processing after reopening.

As we have pointed out, this appeal is brought pursuant to Section 1006 of the Civil Aeronautics Act (49 U.S.C., Sec. 646; 52 Stat. 1024). Paragraph (e) of that Section reads as follows:

> "(e) The findings of fact by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."

At no stage in the proceedings below did Western urge to the Board any objection based on delay in the proceedings on reconsideration, nor has it shown any reasonable grounds for failure to do so. For that reason alone, we submit that its present argument on this point merits no consideration by the Court.

Had Western wished to accelerate the proceedings below, and had the Board on request refused to do so, it would

Certificate of Service

I hereby certify that I have served the foregoing document upon counsel for all parties herein, and upon the attorneys for United Air Lines, Inc., the Air Line Pilots Association and the Airline Mechanics Division, by mailing three copies thereof to each on the 27th day of September, 1951.

CLARENCE M. MULHOLLAND

No. 12867

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

REPLY BRIEF OF PETITIONER WESTERN AIR LINES, INC.

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FILED
OCT 23 1951
PAUL P. O'BRIEN
CLERK

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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REPLY BRIEF OF PETITIONER WESTERN AIR LINES, INC.

Initial Statement.

When stripped of trimmings the briefs of both Respondent Civil Aeronautics Board and Intervener Brotherhood of Railway and Steamship Clerks reduce down essentially to two basic theories on which they seek to uphold the challenged orders of the Board.

The first theory is that Western *misrepresented* the facts and thereby lulled the Board into the conclusion that the transfer of Route 68 from Western to United would not result in an adverse effect on any of Western's employees.

The second theory is that, since the transfer was consummated before the expiration of the time allowed by the Board's rules of procedure within which to file a petition

for reconsideration, Western assumed the risk of having an unconditional approval transposed into a conditional approval by an *ex post facto* order.

Neither of these theories is valid and neither weakens the arguments presented by Western in its opening brief.

I.

Western Did Not Misrepresent the Facts.

With language nearing acrimony the Board in particular, and the Brotherhood in degree, charge Western with having misrepresented the facts and connote that but for these misrepresentations approval of the sale of Route 68 would have been made conditional at the start.

The easy burden of blunting the Board's honed charge of misrepresentation need not be assumed in detail in this reply brief. It is sufficient to repeat, as was said in the opening brief, that Western's president was predicting not proclaiming and that he was careful to cushion his comments in a fashion that could not possibly have misled the Board, as the Board now claims to be the situation. This matter is accorded sufficient treatment in pages 26 through 31 of Western's opening brief.

Parenthetically it may be appropriate to note here that the principal witness for the Air Line Pilots Association, Captain A. W. Stephenson, acknowledged that in 1946 he was paid $11,383.13 by Western, in 1947 $12,382.22 and in 1948 (the year after the transfer of Route 68) $12,517.45. [I, R. 320-1.] The financial adversities claimed to have been suffered by the twenty-one pilots listed in Exhibit 1 of the Air Line Pilots [II, R. 771-85] was answered by Mr. Arthur F. Kelly on behalf of

Western. Most of them received more pay in 1948 than in 1947. [II, R. 703-6.]

The simple fact is that the September 1947 schedule reductions were the normal seasonal winter cutbacks which were placed in effect while Western was undergoing a system-wide program of economy, as evidenced by the fact that in the latter part of 1947 it had approximately 2486 employees compared with 1290 by December 1948. [II, R. 680.]

The basis for Mr. Drinkwater's prediction was that the new extension from San Francisco to Seattle, which was activated at about the same time the Los Angeles-Denver route was deactivated, would constitute an equalizing offset. [I, R. 41-2.] No statistician is required to affirm that this position was sound and entirely justified. Elementary geography confirms that an air route between San Francisco and Seattle is at least equal to an air route between Los Angeles and Denver, with leanings favorable to San Francisco-Seattle from the standpoint of population and climate.

The Board has founded its position on claimed *misrepresentations*. The reason for this, of course, is quite apparent. Under no conceivable theory, moral or legal, could the Board hope to justify its *ex post facto* order other than by claiming misrepresentation.

In its order of July 7, 1950, the Board tacitly conceded the basis of its position when it said:

> "The situation is not altered in this case by reason of the fact that we have already approved the transfer of Route 68 and related physical properties by Western to United without conditions for the benefit of adversely affected employees and that the trans-

fer thus approved has been consummated. As our opinion makes clear, in declining to impose conditions for the benefit of Western's employees in our original order of approval, we relied on the representations of Western's president that its employees would not be adversely affected by the transfer. United-Western, Acquisition of Air Carrier Property, 8 C. A. B. 298, 311. Regardless of whether we could modify our order to impose such conditions in the absence of those representations, we think it clear that Western by reason of them is estopped to challenge any such modification in this proceeding." [II, R. 831.]

In its brief the Board stated on page 8:

"Accordingly, the Board was authorized to amend its order to remedy defects in its initial order of approval which were procured through misrepresentation."

And again on page 16 of its brief:

"Accordingly, and irrespective of the fact that a timely filed petition for reconsideration was pending, the Board had authority to reopen the proceeding because its initial order was procured through misrepresentation."

The evidence presented by Western at the original hearing, both oral and written, which formed the basis for the original unconditional order of approval dated August 25, 1947, was candid and fair. Since any misrepresentation is so completely lacking time need not be spent in probing the record in proof of the fact that substantial evidence likewise is lacking that any employee was adversely affected in consequence of subsequent developments.

II.

Western Did Not Voluntarily Implement the Unconditional Approval With an Assumption of Risk.

In addition to the theory of estoppel predicated on misrepresentation, both the Board and the Brotherhood hold to the view that Western voluntarily consummated the sale of Route 68, which had been unconditionally approved, with full knowledge that the time to file a petition for reconsideration had not expired and that accordingly Western knowingly assumed the risk of having the unconditional order subjected to *ex post facto* modifications. This postulate completely ignores the facts and the law.

On page 24 of its opening brief Western referred to the Board's supplemental opinion on reconsideration in the *Kansas City-Memphis-Florida* case, reported in 9 C. A. B. 401, with this quotation from page 408:

> "In view of our present decision affirming our former judgment, *it will be unnecessary to discuss the question vigorously presented by counsel for Chicago and Southern concerning the statutory power of the Board to revoke upon reconsideration a certificate of public convenience and necessity which was issued and made effective at the time of the original decision. We have grave doubt, however, as to our possession of such power,* and in future cases of this kind, except where national security or other urgent considerations dictate otherwise, we shall pursue a policy of making the certificate effective on such date as will permit reconsideration without creating the legal problem raised in the present case."[1]

In its Brief the Board ignored this quotation and ignored the point for which it was cited by Western.

[1]Emphasis in quoted material added throughout unless otherwise noted.

Section 401(h) of the Civil Aeronautics Act [49 U. S. C. 481 (h)][2] provides that a certificate may be revoked in whole or in part for intentional failure to comply with any provision of Title IV of the Act or of any order, rule or regulation issued under the Act, or of any term or condition or limitation of the certificate, with the express proviso that no certificate shall be revoked unless the holder fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the matter found by the Board to have been violated.

By its supplemental order of September 11, 1947 [II, 894-903] the Board cancelled Western's certificate for Route 68 and amended United's certificate for Route No. 1 to include Los Angeles-Denver effective September 15, 1947, at 12:01 A. M. The only legal way in which the Board could revoke United's certificate for Route 1 in part by eliminating Los Angeles-Denver would be under Section 401(h).

Valid conditions to approval of the transfer of a route can be imposed only at the time the approval is granted, which of necessity must be prior to consummation of the transfer. No mental gymnastics and no linguistic legerdemain can alter this simple truth. After a transfer has been effected pursuant to an unconditional approval, the only means whereby conditions could be imposed would be by revoking the transfer, restoring the status quo and then approving a new transfer with conditions. Once the transfer had been consummated under the Board's order of September 11, 1947, the Board was powerless to undo

[2]A copy of Section 401(h) is included in the Appendix to Western's opening brief.

that which it had done except under the provisions of Section 401(h). This was not done.

In its final order of December 29, 1950, the Board attempted to meet this point by stating:

> "Western argues that there is no way in which the Board can enforce its order of July 7 and compel Western to comply with the conditions. But it seems to us that we have the same power in this case as in any other. Failure by Western to comply with the conditions of the July 7 order would render inoperative the approval heretofore granted under sections 401(i) and 408(b) to the transfer to United of Route 68 and related physical properties. By refusing to comply with the conditions, Western would, unless it could undo the transaction with United, be placing itself in violation of sections 401(i) and 408(b) and would be subject to all the penal and enforcement provisions of the Act applicable to such violation. The fact that Western might find it impractical to undo the transaction would not be a defense because the failure to impose conditions in the original order of approval was due to the Board's reliance on testimony by Western's president and because by consummating the transaction prior to the expiration of the time fixed for reconsideration, Western went ahead at its own risk." [II, R. 863.]

Section 401(i) referred to in the quotation reads:

> "No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest."

The transfer was approved unconditionally by the order of August 25, 1947. By the order of September 11, 1947, Western's certificate for Los Angeles-Denver was can-

celled and United's certificate amended to include Los Angeles-Denver, both effective simultaneously at 12:01 A. M. on September 15, 1947. In as much as Western acted in good faith and under full color of right, it is not known how Western could stand in violation of Section 401(i) if it did not choose to comply with the *ex post facto* conditions but instead insisted that its certificate be restored since the Board now purports to disprove the transfer unless conditions are met.

Section 408(b), likewise referred to in the quotation, empowers the Board to approve certain purchases by one carrier from another "upon such terms and conditions as it shall find to be just and reasonable." When Western acted in good faith under authorization of the unconditional approval of August 25, 1947, and under compulsion of the mandatory order of September 11, 1947 there were no conditions to be met. Failure to comply with conditions imposed after the fact would hardly be a violation of Section 408(b).

On page 8 of its brief the Board claims that Western *voluntarily* consummated the transfer agreement prior to the expiration of the time allowed for filing petitions for reconsideration and that Western accordingly assumed the risk that labor protected conditions or other changes in the Board's order subsequently might be imposed.

In like vein the Brotherhood, commencing on page 32 of its brief, makes light of Western's contention that the transfer of the certificate was compulsory under the order of September 11, 1947, and that it was not in any sense a voluntary act which might be attended with an assumption of risk.

The chiding words used by the Board and by the Brotherhood do not answer the facts and fail completely

to undermine the effect of the terse directives in the order of September 11, 1947, which reads:

"It is Ordered:

1. That effective September 15, 1947, at 12:01 a.m., Pacific Coast Standard Time, the certificate of public convenience and necessity for Route No. 68 issued to Western Air Lines, Inc., pursuant to Order Serial No. 3263, dated November 11, 1944, be and it is hereby cancelled;

2. That the certificate of public convenience and necessity for Route No. 1 issued to United Air Lines, Inc., pursuant to Order Serial No. E-783, dated September 3, 1947, be amended and issued in the form attached hereto;

3. That said amended certificate shall be signed on behalf of the Board by its Chairman, shall have affixed thereto the seal of the Board attested by the Secretary, and shall be effective on September 15, 1947, at 12:01 a.m., Pacific Coast Standard Time;

4. As of 12:01 a.m., Pacific Coast Standard Time, all authorizations by the Board then in effect to render scheduled nonstop service between points on Route No. 68 and all authorizations by the Board then in effect to serve regularly any point on Route No. 68 through an airport convenient thereto shall be deemed to be transferred to United Air Lines, Inc." [II, R. 894-5.]

These are not words of permission, they are words of direction.

Admittedly this order was to Western's liking. That is precisely what Western was seeking when it filed its application jointly with United for approval of the transfer. [I, R. 3-13.] But the fact remains that when Western ceased operations as of 12:01 A. M., Pacific Coast

Standard Time on September 15, 1947, it was doing so under the mandate of the Board and not voluntarily with a voluntarily assumed risk. Had Western not discontinued flying between Los Angeles and Denver at 12:01 A. M., on September 15, 1947, it would have been in direct violation of Section 401(a) (49 U. S. C. 481) which provides that "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation . . ."

The fact that the petition for reconsideration was filed within the time allowed by the rules does not alter the facts. If the *ex post facto* order being challenged is allowed to stand, Western will be compelled to comply with conditions which the law clearly provides can only be imposed under circumstances which will permit the party an effective choice of accepting a condition and going forward or rejecting the condition and becoming resigned to a denial of approval.

The case of *Falwell v. United States,* 69 Fed. Supp. 71, cited by the Brotherhood on page 33 of its brief and by the Board on pages 15 and 17 of its brief, is not authority against Western's position. In that case the parties in fact *voluntarily* went forward with the approved transaction.

The unfounded charge of misrepresentation and the utterly unsupported claim of voluntary assumption of risk are not equitable, legal or moral answers to the issues. The fact remains that Western in good faith did only that which it had to do and is now being denied the legal right of a choice which it would have had, had the Board administered its trust properly.

III.

Neither the Board nor the Brotherhood Has Met the Argument That the Order Illegally Compels Arbitration.

In its opening brief Western urged that the provision for arbitration in the July 7, 1949 order [II, R. 842-47] is illegal on two points. First, the Board cannot make findings, as required by Sections 401(i) and 408(b) of the Act, that an award of arbitrators to be made sometime in the future is consistent with the public interest and is just and reasonable. Second, since the Board ordered compliance with the provision of the arbitration award and did not reserve the power of review, Western would be denied the essential safeguard of a right of court appeal from the arbitration award.

Both the Board and the Brotherhood sought to sidestep the first point with the contention that to require the Board to determine the precise conditions would be too burdensome because too time consuming. No doubt it would be time consuming for the Board, by one of its examiners, to determine which of Western's employees, if any, had been adversely affected and how much money Western should pay to each. But Congress in effect has said that Western is entitled to have the Board determine this, not three unsworn and unskilled arbitrators, one of whom, Western's appointee, would be biased in favor of Western, one of whom, the Union's appointee, would be biased against Western and the third of whom would be a completely unknown quantity.

The Brotherhood, commencing on page 29 of its brief, attempted to argue that the Board did retain jurisdiction to review the award of the arbitrators, quoting in support

of its contention paragraph 12 of the July 7, 1950, order which reads:

> "12. The Board hereby retains jurisdiction of this proceeding for the purpose of modifying or clarifying any provision of this order and for the purpose of imposing from time to time such other or further terms and conditions as to the Board may seem just and reasonable." [II, R. 847.]

This does mean, no matter how liberally construed, that the Board would have the power to review and modify the award of the arbitrators, with respect to which Western would be forced to comply by paragraph 9 of the same order.

The Board and the Brotherhood endeavored to counter Western's second point, that it would be denied a right of court review from an unconscionable award of the arbitrators, on the apparent theory that Western could petition the Board to review the award of the arbitrators, despite the lack of a provision to that effect in the order being challenged, and that a denial of that petition would form the basis of a right of court review.

Section 1006 of the Civil Aeronautics Act, which creates the right of court review, does not warrant this conclusion. In the first place, there is no provision in the Act empowering the Board to compel a party in a proceeding before it to submit any matter to arbitration. In the second place, there is no provision in the Act nor in the order being challenged providing a means for

petitioning the Board to review and, if justice required, modify an award of the arbitrators. This being so, a naked order of the Board denying a petition to review an award of the arbitrators could not form the basis of a petition to this court to review an invalid award of the arbitrators.

Conclusion.

The arguments presented by Western in its opening brief to the effect that the orders being challenged are not just and fair and do violence to the Civil Aeronautics Act have not been met by the Board or by the Brotherhood.

October 22, 1951.

Respectfully submitted,

GUTHRIE, DARLING & SHATTUCK,
HUGH W. DARLING,
Attorneys for Petitioner.

Certificate of Service.

I certify that I am an associate of the firm of Guthrie, Darling & Shattuck, attorneys for Western Air Lines, Inc., and that on this date I will have caused to be served the foregoing brief upon the attorneys of record for the Civil Aeronautics Board, the Brotherhood of Railway and Steamship Clerks and the Air Line Pilots Association by mailing five copies to each, properly addressed with postage prepaid.

Los Angeles, California, October 22, 1951.

George G. Gute

oK

No. 12,877

United States Court of Appeals
For the Ninth Circuit

JOSE CABIGTING MIRANDA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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FILED

DEC 13 1951

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No. 12,877

United States Court of Appeals

For the Ninth Circuit

JOSE CABIGTING MIRANDA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court over the offense charged (violation of former 8 U.S.C. Section 746 (a)(1) now 18 U.S.C. 1015) is conferred by 18 U.S.C. 1291.

STATEMENT OF THE CASE.

Appellant was indicted on ten counts charging violation of former 8 U.S.C. 746(a)(1) now 18 U.S.C. 1015, however, counts VII, IX and X were dismissed by the Government during the trial. The appellant was convicted on count VIII and acquitted on counts I through VI inclusive.

QUESTIONS PRESENTED.

Appellant makes two contentions:

1. That the Court erred in denying appellant's motion to dismiss the first six counts of the indictment (upon which he was acquitted).

2. That the Government failed to produce adequate corroboration to sustain the conviction on count VIII.

ARGUMENT.

I.

THERE WAS NO PREJUDICIAL ERROR IN SUBMITTING TO THE JURY EVIDENCE PERTAINING TO THE OFFENSES CHARGED IN THE FIRST SIX COUNTS OF THE INDICTMENT.

Appellant's first contention is that the first six counts of the indictment were barred by the three-year statute of limitations contained in 18 U.S.C. § 3282 and, hence, that the admission of evidence pertaining to those counts constituted prejudicial error on the part of the trial Court even though appellant was acquitted on each of those counts.

The answer to appellant's contention is two-fold. In the first place, we submit that appellant's contention is without substance inasmuch as the jury found in his favor on each of these counts. In the second place, we submit that, in any event, appellant is in error in his contention that the offenses charged in the first six counts of the indictment were barred by the statute of limitations.

A. SINCE APPELLANT WAS ACQUITTED ON THE FIRST SIX COUNTS, NO PREJUDICE RESULTED FROM THE DENIAL OF HIS MOTION TO DISMISS THOSE COUNTS.

Appellant cites no authority which supports his contention. We submit that this contention is ruled adversely by many cases.

Even where the defendants were convicted on a number of counts, some of which were held on appeal to have been barred by the statute of limitations, the Supreme Court in *Pinkerton v. United States,* 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (rehearing denied, 329 U.S. 818, 67 S. Ct. 26, 91 L. Ed. 697) has held that the judgment cannot be reversed on error if any one of the counts is good and would sustain the judgment. We quote from footnote 1 of the opinion of the Court in that case:

> "The court held that two of the counts under which Walter was convicted and one of the counts under which Daniel was convicted were barred by the statute of limitations and that as to them the demurrer should have been sustained. But each of the remaining substantive counts on which the jury had returned a verdict of guilty carried a maximum penalty of three years' imprisonment and a fine of $5,000. Int. Rev. Code, § 3321, 26 U.S.C. § 3321, 26 U.S.C.A. Int. Rev. Code, § 3321. Hence the general sentence of fine and imprisonment imposed on each under the substantive counts was valid. It is settled law, as stated in Claassen v. United States, 142 U.S. 140, 146, 147, 12 S. Ct. 169, 170, 35 L. Ed. 966, 'that in any criminal case a general verdict and judgment on an indictment or information containing several

counts cannot be reversed on error if any one of the counts is good, and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.'

"'The same rule obtains in the case of concurrent sentences. Hirabayashi v. United States, 320 U.S. 81, 85, 63 S. Ct. 1375, 1378, 87 L. Ed. 1774, and cases cited.''

See also *Allis v. United States,* 155 U.S. 117, 15 S. Ct. 36, 39 L. Ed. 91, involving admission of testimony as to counts on which the defendant was acquitted.

Where the conviction is sustainable on one count, there is no ground for reversing the case because of error in charging as to another count. *Brooks v. United States,* 267 U.S. 432, 45 S. Ct. 345, 69 L. Ed. 699.

See also:

Sinclair v. United States, 279 U.S. 263, 49 S. Ct. 268, 73 L. Ed. 692;

Abrams v. United States, 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173.

"The urge is that the offense, if any as charged in the second count, is a continuing one, in which time is such a material element that it is error to admit evidence relating to dates outside of the time covered in the allegation. It is not necessary to decide that question, because the evidence objected to was competent under the first count.

But, if not competent under that count, was its admission reversible error? Brown was tried and acquitted on that evidence under the first count, and it is not conceivable that such evidence could have been influential in bringing about the conviction under the second count, to support which there was much other evidence."

Brown v. United States (C.C.A. 7), 22 F. (2d) 293, at p. 294.

"This contention of error is that the court should have instructed the jury to find the defendant not guilty on counts 23 to 26, inclusive, involving the second scheme, and 27 to 30, inclusive, involving the third scheme. In view of acquittal under all of these counts, we can see no possible harm to plaintiff in the court's denial of the motion to so instruct. Had such instruction been given, the jury could have done no more than find for the defendant on these counts, and this it did without direction."

Arnold v. United States (C.C.A. 7), 7 F. (2d) 867, at p. 870.

Moreover, there would seem to be no doubt that the evidence relative to the transactions described in the first six counts of the indictment was relevant to prove knowledge and intent as well as to show a consistent pattern of conduct.

Nye & Nissen et al. v. United States, 336 U.S. 613, 69 S. Ct. 766, 93 L. Ed. 919.

We submit, that there was no prejudicial error in the denial of appellant's motion to dismiss the first

six counts of the indictment, since he was acquitted on each of those counts. However, we shall proceed to demonstrate that the motion to dismiss was without merit in any event.

B. THE FIRST SIX COUNTS OF THE INDICTMENT WERE NOT BARRED BY THE STATUTE OF LIMITATIONS.

For the reasons set forth above, we submit that it is not necessary to decide in this case whether the trial Court was correct in denying appellant's motion to dismiss the first six counts of the indictment, since appellant was not convicted on any of those counts. However, we submit, in any event, that appellant is in error in his contention that the first six counts were, in fact, barred by the statute of limitations.

In *United States v. Bridges,* 86 F. Supp. 922 (which is now on appeal to this Court—Case No. 12597), the District Court for the Northern District of California considered a similar count, among others, and held that prosecution was not barred by the statute of limitations. In that case the offense was committed on September 17, 1945, and the indictment was returned on May 25, 1949. The Court held in that case that the running of the statute of limitations was suspended by the Act of August 24, 1942 (18 U.S.C. § 3287) and that, in any event, the five-year statute of limitations formerly contained in 8 U.S.C. § 746(g) survived the repeal of the latter statute by the Act of June 25, 1948 (new Title 18, U.S.C.) as to violations of the former statute which were committed prior to

its repeal. In its brief in the *Bridges* case, *supra,* the Government has fully discussed the law in this regard, and since the point does not arise in the case at bar except with regard to counts on which appellant was acquitted, we shall confine our discussion here to a more brief consideration of the authorities on this particular point.

1. The five-year limitation applies to the offenses charged in this indictment.

In the case at bar each count of the indictment charges a violation of section 346(a)(1) of the Nationality Act of 1940 (formerly 8 U.S.C. § 746(a)(1)), the pertinent parts of which we quote:

> "(a) It is hereby made a felony for any alien or other person, * * *
>
> "(1) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.
>
> * * * * * * *
>
> "(d) Any person violating any provision of subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> * * * * * * *
>
> "(g) No person shall be prosecuted, tried, or punished for any crime arising under the provisions of this chapter unless the indictment is found or the information is filed within *five years*[1]

[1]The offenses charged in the first six counts of the indictment (on which counts appellant was acquitted) were committed in June, July, and August 1947. The indictment was filed on October 2, 1950. (Tr. 4-13.)

next after the commission of such crime." (Italics added.)

The foregoing subdivisions of that section were repealed by the Act of June 25, 1948, which revised the Criminal Code (Title 18, U.S.C.). We submit that the five-year limitation contained in subsection (g), *supra,* survived the repeal with regard to violations committed prior to the repeal.

The repealing section of the 1948 Act (18 U.S.C.A. §§ 1-370, p. 275) provides:

> "The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule[2] are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal."

The Supreme Court has considered similar language contained in the Revenue Act of 1924 in the case of *Russell et al. v. United States,* 278 U.S. 181, 188, 49 S. Ct. 121, 73 L. Ed. 255, wherein the Court said:

> "Paragraph (e), (2), of § 278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not 'affect' an assessment within the meaning of the paragraph. We cannot agree. Some real force must be given to the words used—they were not employed without

[2]The schedule of repealed sections or parts thereof lists "Title 8, U.S. Code, section 746 (a-h)".

> definite purpose. The rather obvious design, we think, was to deprive § 278 of any possibile application to cases where assessment had been made prior to June 2, 1924."

We submit that the situation here presented is a direct parallel to the *Russell* case, *supra,* and that the new statute of limitations cannot be retroactively applied to violations committed prior to its enactment because of the provision that existing liabilities "shall not be affected" by the repeal.

The Supreme Court in another case, viz., *United States v. St. Louis, San Francisco and Texas Railway Company,* 270 U.S. 1, 46 S. Ct. 182, 70 L. Ed. 435, has again held that a statute of limitations did not bar a cause of action which had accrued before its enactment. In that case the Court said:

> "That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this Court to statutes governing procedure. *United States Fidelity and Guaranty Co. v. United States,* 209 U.S. 306; and specifically to the limitation of actions under another section of Transportation Act, 1920. *Fullerton-Krueger Lumber Co. v. Northern Pacific Ry. Co.,* 266 U.S. 435. There is nothing in the language of paragraph 3 of § 16, or in any other provision of the Act, or in its history, which requires us to hold that the three-year limitation applies, under any circumstances, to causes of action existing at the date of the Act."

Here there is neither "explicit language" nor "necessary implication" justifying retroactive application of the new statute of limitations. (18 U.S.C. § 3282.) In fact, as pointed out above, the new statute itself expressly provides that existing liabilities shall not be "affected", and this precludes application of its new limitation provisions to prior offenses. (*Russell et al. v. United States, supra.*)

We are aware that in *United States v. Obermeier,* 186 F. (2d) 243, cert. den., 340 U.S. 951, 71 S. Ct. 573, 95 L. Ed. 452 (upon which appellant relies and which we shall later discuss more fully), the Court held that the five-year limitation of 8 U.S.C. former § 746(g) was not preserved by the repealing section of the 1948 Codification Act because the language of the saving clause operated to preserve only substantive liabilities and did not preserve limitations which the Court considered to be simply matters of procedure. We submit that this holding is directly contrary to the principles laid down by the Supreme Court in the cases of *Russell et al. v. United States, supra,* and *United States v. St. Louis, San Francisco and Texas Railway Company, supra.* Furthermore, in *United States Fidelity and Guaranty Company v. United States for the use of Struthers Wells Company,* 209 U.S. 306, 28 S. Ct. 537, 52 L. Ed. 804, the Supreme Court specifically considered a contention that where an amendment to a statute relates only to procedure it necessarily takes effect upon causes of action existing when the amendment was passed, and said:

"If the limitation as to the district in which the suit upon the bond could be brought were to be regarded as simply matter of procedure (which we do not assert), we still think it is not to be construed as applying retrospectively. As it is only a question of intention we are not prepared to hold that the section is prospective in its operation in regard to all its other provisions, but retrospective in the one instance, as to the district in which the suit is to be commenced. *Even matters of procedure are not necessarily retrospective in their operation in a statute, and we see no reason for holding that this statute, of but one section, should be split up in its construction, and one portion of it made applicable to cases already existing and other portions applicable only to the future.*" (Italics added.)

That the five-year limitation contained in 8 U.S.C. former § 746(g) survived the repeal with regard to violations committed prior to the repeal is also clear from Title 1, U.S.C. § 109, which, so far as is pertinent, provides:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, *and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.* * * *" (Italics added.)

The section last quoted must be read as though it were a part of the repealing statute.

Great Northern Railway Co. v. United States, 208 U.S. 452, 28 S. Ct. 313, 52 L. Ed. 567;

United States v. Reisinger, 128 U.S. 398, 9 S. Ct. 99, 32 L. Ed. 480.

So read, the repealing statute declares, in effect, that 8 U.S.C. § 746(a) to (h) are repealed, but that such repeal shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred thereunder, and that "such statute (including subdivision (g)—the five-year limitation clause) *shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement* of such penalty, forfeiture, or liability." (Italics and parenthetical phrase added.)

This Court in the case of *DeFour v. United States,* 260 Fed. 596, 599, has held that the provisions of 1 U.S.C. § 109, *supra* (then embodied in R.S. § 13) are to be treated as if incorporated in subsequent enactments of Congress and must be enforced as forming a part of such subsequent enactments, except in those instances where, by express declaration or necessary implication, such enforcement would nullify the legislative intent. This Court further held in that case that legislative intent to disregard these provisions is not to be found in the mere fact of repeal of a pre-existing statute, since "such a repeal as that is expressly contemplated by section 13". Consequently, the mere fact that Congress repealed subsection (g)

of 8 U.S.C. § 746, discloses no intention that the newly enacted limitation is to override the prior limitation in prosecutions for offenses committed prior to the repeal.

In line with the foregoing principle, the Court of Appeals for the Fifth Circuit has held in the case of *United States v. Carter et al.,* 171 F. (2d) 530, that to abolish preexisting "remedies" an express provision therefor must appear in the repealing statute, because of 1 U.S.C. § 109, *supra.*

Similarly, in *National Labor Relations Board v. Gate City Cotton Mills* (C.C.A. 5), 167 F. (2d) 647, it was held that a new enactment fixing a time limitation for proceedings to prevent unfair labor practices was not applicable where the cause of action arose prior to the passage of the new enactment. (Citing 1 U.S.C. § 109, *supra.*)

We submit, therefore, that whether the limitation carried in section 746(g), *supra,* be a matter of procedure or one of substance is immaterial to the question here presented. We submit further that section 746(g) is to be treated as still remaining in force under 1 U.S.C. § 109, *supra,* for the purpose of sustaining a prosecution for a liability incurred under subdivision (a) of section 746.

In *Lovely v. United States* (C.C.A. 4), 175 F. (2d) 312 (cert. den. 338 U.S. 834), it was held that the provisions of 1 U.S.C. § 109, *supra,* prevent a Court from imposing the lesser sentence provided for in the 1948 Code and made it mandatory upon the Court to im-

pose the greater punishment prescribed in the repealed statute, in the case of an offense which was committed prior to the repeal. (See also *United States v. Kirby* (C.C.A. 2), 176 F. (2d) 101, to the same effect.) That proposition stands out most starkly in the case of *Lovely, supra,* because the repealed statute carried a mandatory sentence of life imprisonment for the offense of which the appellant stood convicted, whereas the new statute covering such an offense gives the Court discretion to sentence to imprisonment "for any term of years or for life".

In *Hiatt v. Hilliard* (C.C.A. 5), 180 F. (2d) 453, involving the question of whether the more liberal procedure for computing good conduct allowances of prisoners, which was enacted in the codification of Title 18, U.S.C., should be given retroactive effect, the Court said:

> "Whether a statute operates retroactively or prospectively is one of legislative intent. In gathering this intent, certain settled rules of statutory construction apply. Some of these are: that a statute should not be given retroactive effect where another construction is fairly permissible; 'that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect.' Fullerton-Krueger Lumber Co. v. Northern Pac. Ry. Co., 266 U.S. 435, 45 S. Ct. 143, 144, 69 L. Ed. 367, and cases cited; that in considering statutes, 'The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that

> intention be clearly declared.' Shwab v. Doyle, 258 U.S. 529, 42 S. Ct. 391, 392, 66 L. Ed. 747, 26 A.L.R. 1454; that 'Retroactivity, even where permissible, is not favored, except upon the clearest mandate.' Claridge Apts. Co. v. C.I.R., 323 U.S. 141, at page 164, 65 S. Ct. 172, at page 185, 89 L. Ed. 139."

When those settled rules of construction are considered in conjunction with the saving clauses in section 21 of the 1946 Act and in 1 U.S.C. § 109, *supra,* the conclusion is irresistible that the new limitation is not to be retrospectively applied to prosecutions for violations of the repealed provisions.

The three Supreme Court decisions which the Court cited in the *Obermeier* case as restricting the application of former R.S. § 13 (now 1 U.S.C. § 109) to so-called "substantive" rights and liabilities and not preserving remedies or procedure, did not involve statutes of limitations and do not impel the conclusion reached in that case.

For example, in *Great Northern Railway Co. v. United States, supra,* the argument presented by the appellant grew out of a saving clause in an amendatory statute that "The amendments herein provided for shall not affect causes now pending in Courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." The defendants contended that this language negatived an intent to preserve *any* liabilities except where suit was already pending. What the Supreme

Court really held was that since the new statute spoke only of the *procedure* to be applied in pending suits, this evidenced no Congressional intent to cut off the right to prosecute for prior offenses, which right was saved by the general provisions of R.S. § 13. When analyzed in the light of the facts and contentions then under consideration, the decision does not place upon R.S. § 13 the restricted interpretation deduced by the Court in the *Obermeier* case.

The case of *Hertz v. Woodman,* 218 U.S. 205, 30 S. Ct. 621, 54 L. Ed. 1001, also cited in the *Obermeier* decision, involved the question whether a tax liability had accrued under the prior statute at the time of its repeal. The question, therefore, was simply whether in that case there was *any* "liability" upon which R.S. § 13 could operate.

The third case cited in the *Obermeier* opinion on the point under discussion is *Hallowell v. Commons,* 239 U.S. 506, 36 S. Ct. 202, 60 L. Ed. 409. In that case the repealing act had taken away the jurisdiction of the Courts with regard to certain Indian claims and had restored exclusive jurisdiction over those matters to the Secretary of the Interior. The Court found, in the situation there presented, evidence of a Congressional intent to apply the new statute retroactively, feeling that the amendment "evinces a change of policy, and an opinion that the rights of the Indians can be better preserved by the quasi-paternal supervision of the general head of Indian affairs". The Court said, in passing, that this "takes away no substantive right but simply changes the tribunal that is

to hear the case." We fail to see any support here for the restricted interpretation given 1 U.S.C. § 109 and section 21 of the 1948 Codification Act by the Court in the *Obermeier* case.

In the *Obermeier* case great emphasis was laid on the fact that in enacting the Revised Statutes of 1874, and again in enacting the Criminal Code in 1909, Congress included, in addition to the general saving provision then contained in R.S. § 13 (now 1 U.S.C. § 109), another provision specifically preserving pre-existing periods of limitations applicable to offenses committed prior to the revision and repeal of the old law. From this, the Court reasoned that since special provisions were deemed necessary on those occasions to save statutes of limitations in prosecutions under the old law, if Congress had intended to save the five-year period of limitation contained in 8 U.S.C. § 746 in prosecutions for offenses committed prior to the repeal, it would have so stated in section 21 of the 1948 Act. This reasoning takes no account of the broad and all-embracing language of section 21 which says that "Any rights or liabilities now existing under such sections or parts thereof shall not be *affected* by this repeal." Giving these words their ordinary meaning, and considering them in the situation in which they were used, it seems clear that what Congress intended to convey was that the repeal should not change the situation in any respect with regard to past transactions. (Cf. *Russell et al. v. U. S., supra.*) Certainly in its ordinary meaning, this language cannot be reconciled with a theory which

would operate to abate prosecutions which might even be then pending. The latter effect is the necessary result of the holding in the *Obermeier* case, and we submit that it cannot be sustained on a reasonable interpretation of the statutory provisions here involved.

We submit that, in the circumstances here presented, to say that the statute of limitations is a mere matter of "procedure" is to beg the question. The question is whether a specific subsection (8 U.S.C. former § 746(g)) of a repealed statute is to be "treated as still remaining in force for the purpose of sustaining any * * * prosecution" for the enforcement of a liability incurred under the old law. Can we say that subsections (a) to (f), the so-called "substantive" parts of that section, are in effect for the purpose of sustaining such a prosecution, but that subsection (g) is not in effect for that purpose? We submit that the answer to this latter question must be in the negative under any reasonable interpretation of the language of 1 U.S.C. § 109 and section 21 of the 1948 Codification Act. Consequently, we submit that the five-year statute of limitations formerly contained in 8 U.S.C. § 746(g) is applicable rather than the three-year limitation contained in 18 U.S.C. § 3282.

2. In any event, the statute of limitations was tolled by the Suspension Act.

The violations charged in the first six counts of the indictment in the case at bar were committed during

June, July, and August 1947, and the indictment was returned on October 2, 1950. (Tr. 4-9.) The so-called Suspension Act of August 24, 1942, as amended (18 U.S.C. § 3287) provides that:

> "When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress."

If the offenses charged in the first six counts of the indictment in the case at bar fall within the terms of the Suspension Act, the statute of limitations did not begin to run until December 31, 1949. (*United States v. Choy Kum et al.* (D.C., N.D., Cal.), 91 F. Supp. 769.)

The Suspension Act applies to "every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense".

United States v. Noveck, 271 U.S. 201, 204, 46 S. Ct. 476, 70 L. Ed. 904;

United States v. Scharton, 285 U.S. 518, 522, 52 S. Ct. 416, 76 L. Ed. 917;

Bailey v. United States (C.C.A. 9), 13 F. (2d) 325, 326;

United States v. Gottfried et al. (C.C.A. 2), 165 F. (2d) 360 (cert. den., 333 U.S. 860,

68 S. Ct. 738, 92 L. Ed. 1139, and rehearing denied, 333 U.S. 883, 68 S. Ct. 910, 92 L. Ed. 1157);

Falter et al. v. United States (C.C.A. 2), 23 F. (2d) 420, 426 (cert. den., 277 U.S. 590, 48 S. Ct. 528, 72 L. Ed. 1003);

Miller v. United States (C.C.A. 2), 24 F. (2d) 353, 360 (cert. den., 276 U.S. 638, 48 S. Ct. 421, 72 L. Ed. 745);

Weinhandler v. United States (C.C.A. 2), 20 F. (2d) 359, 361 (cert. den., 275 U.S. 554, 48 S. Ct. 116, 72 L. Ed. 423);

Evans v. United States (C.C.A. 4), 11 F. (2d) 37, 39;

United States v. Agnew (D.C., E.D., Pa.), 6 F.R.D. 566;

United States v. Choy Kum et al., supra.

While the statutory provision defining the particular offense involved in the case at bar (8 U.S.C. former § 746(a)(1)) does not use the word "fraud", there is strong support for considering that fraud is implicit in this offense.

In the denaturalization case of *Knauer v. United States,* 328 U.S. 654, 672-673, 66 S. Ct. 1304, 90 L. Ed. 1500, the Court clearly showed that it considers that false swearing in connection with obtaining citizenship is a fraud against the Government.

In *United States v. Ness,* 245 U.S. 319, 324, 38 S. Ct. 118, 62 L. Ed. 321, Mr. Justice Brandeis said:

> "Experience and investigation had taught that the wide-spread frauds in naturalization, which led to the passage of the Act of June 29, 1906, were, in large measure, due to the great diversities in local practice, the carelessness of those charged with duties in this connection, and the prevalence of *perjured testimony* in cases of this character." (Italics added.)

There are several strong indications that Congress considered false swearing in naturalization proceedings as involving fraud. For example, one of the grounds for denaturalization prescribed by section 338(a) of the Nationality Act of 1940 (8 U.S.C. § 738(a)) is fraud in the procurement of the certificate. If falsehood and deception in a naturalization constitute fraud against the United States for purposes of denaturalization, it is difficult to see why such false swearing as is charged in the case at bar is not a fraud against the United States within the meaning of the Suspension Act. Speaking of such false swearing in a naturalization proceeding in *Del Guercio v. Pupko,* 160 F. (2d) 799, this Court said:

> "Should the courts condone these deceitful practices the whole procedure preliminary to naturalization would be effectively undermined and the declared purpose of Congress frustrated. Cf. Knauer v. United States, 328 U.S. 654; United States v. Goldstein, 30 F. Supp. 771, 773. Clearly the perpetration of such a fraud upon the government in the very process of naturalization involves moral turpitude and exhibits the unfitness of the applicant for the high privilege of citizenship."

While the Court was not there considering the applicability of the Suspension Act, nevertheless the opinion illustrates the broad fashion in which "fraud" is used for the various purposes of the naturalization laws. This is borne out by the legislative history of the denaturalization provisions. The House Report dealing with cancellation of naturalization on grounds of fraud (House Report 1789, 59th Cong., 1st Sess., p. 2) said:

> "The conditions that have been revealed by special investigations of the frauds committed against the naturalization laws render wholly unnecessary any argument upon the necessity at this time of fully exercising all the authority in naturalization matters conferred by the Constitution upon Congress. * * * The worst and most glaring frauds have consisted in perjury, false impersonation, and the sale and use of false and counterfeit certificates of naturalization."

See also *Knauer v. United States, supra,* at pages 671-672, and *United States v. Ness, supra.*

The holding in *United States v. Obermeier, supra,* that the Suspension Act does not apply to the offense involved here was based entirely on three decisions of the Supreme Court which considered specific statutory offenses arising under the Revenue Acts. (*United States v. Noveck,* 271 U.S. 201, 46 S. Ct. 476, 70 L. Ed. 904; *United States v. McElvain,* 272 U.S. 633, 47 S. Ct. 219, 71 L. Ed. 451; and *United States v. Scharton,* 285 U.S. 518, 52 S. Ct. 416, 76 L. Ed. 917.) These three cases, however, dealt with an excepting proviso which

distinguished those internal revenue offenses which were denominated as containing an element of fraud from those offenses which were not so denominated. The question was as to the intended scope of an excepting proviso to a particular statute, and it was in those circumstances that the Court looked to the words of that statute for the solution of the particular problem of interpretation there presented. The resulting anomaly was shortly removed by Congress. (Cf. *Braverman v. United States,* 317 U.S. 49, 54-55, 63 S. Ct. 99, 87 L. Ed. 23.)

The Suspension Act which is under consideration here was separately enacted to forward a general policy, and the reasons for strict construction of the excepting proviso considered in the *Noveck, McElwain,* and *Scharton* cases do not here exist.

We submit that the offense of false swearing in a naturalization proceeding is one which involves fraud against the United States within the meaning of the Suspension Act (18 U.S.C. § 3287), and, hence, that the statute of limitations did not begin to run until December 31, 1949. Consequently, we submit that the first six counts were not barred, regardless of whether the five-year statute or the three-year statute is applicable.

II.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICT ON COUNT VIII.

The second point advanced by appellant is that there was not sufficient corroboration to justify a verdict of guilty on count VIII.

Initially, it should be observed that count VIII is not predicated on a violation of the general perjury statute,[3] but on Section 346(a)(1) of the Nationality Act of 1940. This Section of the Nationality Act has been codified at 18 U.S.C. (1948 rev.) 1015 under the chapter designation of "Fraud and False Statements" along with 18 U.S.C. 1001, relating to false statements or entries generally in any matter within the jurisdiction of any department or agency of the United States. The general tenor of the language of Section 346(a)(1) much more closely resembles the offense proscribed by the present 18 U.S.C. (1948 rev.) 1001 relating to "Statements or Entries Generally" than it does to 18 U.S.C. (1948 rev.) 1621, the general perjury section. This Court has held that the rule laid down in *Weiler v. United States,* 323 U.S. 606, that the uncorroborated testimony of one witness is not enough to sustain the charge of perjury, is inapplicable in a prosecution under 18 U.S.C. (1948 rev.) 1001. *Todorow v. United States,* 173 F. (2d) 439, 443-444, certiorari denied, 337 U.S. 925. By a parity of reasoning, it should also be inapplicable to proof of a violation of Section 346(a)(1) of the Nationality Act of 1940.

[3]Now found at 18 U.S.C. 1621.

It is apparent that appellant has misconstrued this rule and believes that every single element of proof must be in itself established by more than the uncorroborated testimony of one witness. Such is not the rule. The only element of proof required to be corroborated is that of the falsity of the statements made by appellant. 70 C.J.S. 539; *United States v. Hall,* 44 Fed. 864; *United States v. Hiss,* 185 F. (2d) 830 (C.A. 2), certiorari denied, 340 U.S. 988; *United States v. Seavey,* 180 F. (2d) 837, 839 (C.A. 3), certiorari denied 339 U.S. 979; *United States v. Palese,* 133 F. (2d) 600, 603-604 (C.A. 3). The *Weiler* case cited *supra,* requires no more than that defendant shall not be convicted by an oath against his oath. *Maragon v. United States,* 187 F. (2d) 79 (C.A.D.C.) certiorari denied 341 U.S. 932.

The jury in the case at bar had to answer two questions:

(1) Did appellant make the statements alleged by appellee?

(2) Were such statements false?

As argued supra, it was only necessary that appellee establish to the satisfaction of the jury that the said statements were made. The making of the statements was established not only by the testimony of the Naturalization Examiner (T.R. 210-226), but by the testimony of the petitioner for naturalization (T.R. 199-210) as well as the executed form "Petition for Naturalization" upon which the statements were noted. (Ex. No. 8.)

As to the second question to be determined by the jury, the government did not rest its case on the oath of one witness, but on the testimony of the Examiner (T.R. 210-226), the testimony of the petitioner (T.R. 199-210), documentary evidence (Ex. 8, 9 and 10) and the testimony of the appellant himself. (T.R. 251-257, 278, 305-307.) The statements in question were to the effect that appellant was acquainted with petitioner and saw the petitioner, monthly, during the period of time, 1942 to 1946—a period during which appellant admits that he was not in the Continental United States. As indicated above, such absences are also borne out by appellant's Navy Record, which was made an exhibit. (Ex. No. 9.) In fact, it may be stated that there is no dispute between the parties that if the statements were in fact made, they would be false. This is conceded in appellant's brief. (p. 5.)

Therefore, far from failing to meet the quantitative rule that perjury or that false statements be proven by more than just an oath for an oath, the appellee has greatly exceeded the requisite minimum quantum of proof.

CONCLUSION.

We submit that no prejudicial error has been shown and that the judgment of the Court below should be affirmed.

Dated, San Francisco, California,
December 10, 1951.

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No. 12880

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GUY F. ATKINSON CO., and J. A. JONES CONSTRUCTION CO.,
Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

JUL 18 1951
PAUL P. O'BRIEN,
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

PATRICK H. WALKER,

Seattle, Wash.

For the General Counsel of the National Labor Relations Board.

WILLIAM C. ROBBINS,

Richland, Wash.

For Guy F. Atkinson Co. and J. A. Jones Construction Co.

E. J. EAGEN,

1228 Joseph Vance Bldg.,
Seattle, Wash.
For Mr. Hewes.

L. PRESLEY GILL,

2800 First Ave.,
Seattle, Wash.,
For International Union of Operating Engineers, Local 370, A. F. of L.

United States of America
National Labor Relations Board

NLRB 501
(10-20-47)

CHARGE AGAINST EMPLOYER

1. Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that

(Name of employer): Guy F. Atkinson Company and J. A. Jones Construction Co.

(Address of establishment): North Richland, Wash.

(Number): Employing unknown workers.

(Nature of business): Construction at Hanford Project.

has engaged in and is engaged in unfair labor practices within the meaning of Section 8(a) subsections (1) and (3) of said Act, in that:

2. On or about February 19, 1948, acting by and through its officers, agents and employees, the company wrongfully and illegally discharged the undersigned, Chester R. Hewes; and prior to and at all times since November 1, 1947, it has wrongfully and illegally required prospective employees and regular employees, particularly those doing work regularly and customarily performed by machinists, to become or agree to become members of Local 370 of the International Union of Operating Engineers and has made it a general practice to discriminate

in regard to the hire and tenure of employment in order to encourage membership in said Local 370 under the pretext of complying with an alleged agreement dated August 16, 1947, but which alleged agreement does not describe an appropriate unit for machinists and does not give Local 370 any authority to require closed shop conditions as to people who are not its members, particularly machinists, all in violation of Section 8 (a) (3).

By each of the aforesaid acts and various other acts and statements, the company, by its officers, agents, and employees has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by Section 7 of said Act, in violation of Section 8 (a) (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

3. (Paragraphs 3, 4, and 5 apply only if the charge is filed by a labor organization.) The labor organization filing this charge, hereinafter called the union, has complied with Section 9(f) (A), 9(f)(B)(1), and 9(g) of said Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing code number The financial data filed with the Secretary of Labor is for the fiscal year ending

A certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(B)(2) stating the method employed by the union in furnishing to all its members copies of the

financial data required to be filed with the Secretary of Labor.

4. Each of the officers of the union has executed a non-communist affidavit as required by Section 9(h) of the Act.

5. Upon information and belief, the national or international labor organization of which this organization is an affilaite or constituent unit has also complied with Section 9(f), (g), and (h) of the Act.

6. (Full name of labor organization, including local name and number, or person filing charge): Chester R. Hewes, 803 So. 11th Ave., Yakima, Wash.

(Address):

(Telephone number): 22317.

7. (Full name of national or international labor organization of which it is an affiliate or constituent unit):

(Telephone number):

By /s/ CHESTER R. HEWES.

(Signature of representative or person filing charge.)

Do Not Write in This Space

Case No. 19-CA-28

Date filed: 2-27-48

9(f), (g), (h) cleared

Subscribed and sworn to before me this 27th day

of February, 1948, at Seattle, Washington, as true to the best of deponent's knowledge, information and belief.

/s/ P. H. WALKER,
(Board Agent.)

(Submit original and four copies of this charge.)
[Admitted in evidence as General Counsel's Exhibit No. 1-A.]

United States of America, Before the National Labor Relations Board, Nineteenth Region

Case No. 19-CA-28

In the Matter of:

GUY F. ATKINSON CO., a Corporation; J. A. JONES CONSTRUCTION CO., a Corporation, d/b/a GUY F. ATKINSON CO. and J. A. JONES CONSTRUCTION CO.

and

CHESTER R. HEWES

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 370, AFL,
Party to the Contract.

COMPLAINT

It having been charged by Chester R. Hewes, 803 S. 11th Avenue, Yakima, Washington, that Guy F. Atkinson Co. and J. A. Jones Construction Co., a

joint venture, hereinafter called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, as amended by 61 Stat. 136, herein called the Act, the National Labor Relations Board, herein called the Board, acting through its General Counsel and by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 5, Section 203.15, hereby issues this complaint and alleges as follows:

I.

Guy F. Atkinson Co. is and has been at all times herein mentioned, a corporation duly organized and existing by virtue of the laws of the State of Nevada. J. A. Jones Construction Co. is and has been at all times herein mentioned a corporation duly organized and existing by virtue of the laws of the State of North Carolina. At all times material herein, said above-named corporations associated themselves together in a joint venture, doing business under the firm name and style of Guy F. Atkinson Co. and J. A. Jones Construction Co.

II.

At all times herein mentioned Respondent has maintained an office and place of business at Richland, Washington, where it is engaged in performing construction work pursuant to Letter Subcontract No. C-133 and agreement made July 25, 1947, with General Electric Co., a corporation.

III.

Respondent in the course and conduct of its business at Richland, Washington, for the period from July 29, 1947, to April 6, 1948, caused to be purchased and delivered to it building materials of the approximate value of $20,000,000.00. Approximately $2,500,000.00 in value of such materials were shipped in interstate commerce from States of the United States other than the State of Washington. In addition, approximately $9,500,000.00 in value of such materials were purchased, fabricated and originated at places outside of the State of Washington and were transported to vendors within the State of Washington and thereafter were transshipped to Respondent from points within the State of Washington.

IV.

International Association of Machinists, herein called IAM, and International Union of Operating Engineers, Local 370, affiliated with the American Federation of Labor, herein called Engineers, each is a Labor Organization within the meaning of Section 2, Sub-division (5) of the Act.

V.

On or about February 19, 1948, Respondent did discharge Chester R. Hewes, employed at its operations at Richland, Washington.

VI.

Respondent has since on or about February 15,

1948, failed to, refused to, and continues to refuse to reinstate the said Chester R. Hewes to his former or substantially equivalent position of employment.

VII.

Respondent did discharge and refuse to reinstate the said Chester R. Hewes for the said employee joined or assisted IAM or engaged in other concerted activities for purposes of collective bargaining or other mutual aid and protection or for the reason that he did not become a member in good standing of Engineers.

VIII.

Since on or about November 1, 1947, Respondent has solicited its employees to become and remain members of Engineers.

IX.

On or about August 15, 1947, Respondent did enter into a written agreement with the Building and Construction Trades Department of the AFL, of which Engineers was a signatory Union, relating to terms and conditions of employment of its employees at its Richland Operations, which agreement required of its said employees, as a condition of continued employment, membership in Engineers.

X.

The agreement referred to in paragraph IX was executed and made effective by Respondent at a time when Engineers did not represent a majority

of the employees at its Richland operations within an appropriate unit, nor in any unit of Respondent's employees at the Richland operations that was appropriate for collective bargaining.

XI.

The agreement referred to in paragraph IX was executed and made effective by Respondent at a time when IAM given to Respondent actual notice of its claim to represent employees in an appropriate unit consisting of employees employed as machinists, customarily and regularly performing work of machinists.

XII.

During all of the time said Hewes was employed by Respondent, said Hewes performed work regularly and customarily performed by Machinists and not the type of work performed by Engineers or coming within the terms of said contract. In spite of that fact, on or about February 16, 1948, Engineers by letter requested the discharge of said Hewes, and acting pursuant to said letter, Respondent did discharge Hewes on or about February 19, 1948.

XIII.

By reason of the acts described in paragraphs VIII, IX, X, and XI the said agreement described in paragraph IX is invalid and in violation of the Act, and interfers with, restrains and coerces Respondent's employees in the exercise of rights guaranteed by the Act.

XIV.

By the acts described above in paragraphs V, VI, VIII, IX, X and XI and for the reasons set forth in paragraph VII, Respondent did discriminate in regard to tenure of employment of the said Chester R. Hewes and in regard to the hire of other employees at its Richland operations, and did then and is now encouraging membership in Engineers, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

XV.

By the acts described in paragraphs VIII, IX, X and XI, Respondent has assisted and supported and is assisting and supporting Engineers, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (2) of the Act, re-enacted as Section 8 (a) (2) of the Act, as amended.

XVI.

By the acts and for the reasons described in paragraphs V to XV, inclusive, Respondent has interfered with, restrained and coerced and is interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

XVII.

The activities of Respondent as set forth in paragraphs V to XV, inclusive, occurring in connection with the operations of Respondent described in paragraphs II and III, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States of the United States and tend to lead to labor disputes which burden and obstruct the free flow of commerce.

XVIII.

The acts of Respondent as described above constitute unfair labor practices affecting commerce within the meaning of Section 8 (1) and (2) of the Act, re-enacted as Section 8 (a)(1) & (2) of the Act, as amended, and Section 8 (a) (3) and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the Board, on behalf of the Board, on this 28th day of September, 1948, issues this complaint against Guy F. Atkinson Co. and J. A. Jones Construction Co.

/s/ THOMAS P. GRAHAM, JR.
Regional Director National
Labor Relations Board.

[Admitted in evidence as General Counsel's Exhibit No. 1-C.]

Received September 30, 1948.

Before the National Labor Relations Board
Nineteenth Region

[Title of Cause.]

ANSWER OF GUY F. ATKINSON COMPANY AND J. A. JONES CONSTRUCTION CO.

Answering Paragraphs I, II, III, IV, V, VI, and IX, we admit the same.

Answering Paragraphs VII, VIII, X, XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII, we deny the same and the whole thereof.

First Affirmative Defense

I.

That the Respondent is not engaged in "Commerce," nor do its said operations "affect commerce" within the meaning of the NLRA as Amended.

II.

That it would not effectuate the purposes of the NLRA as Amended for the NLRB to assume jurisdiction over the Respondent in its said activities.

Second Affirmative Defense

I.

That the work performed by Respondent is known as building trades construction work. That by custom immemorial in the industry, persons and firms desiring said work to be done require the execution of contracts well in advance of the com-

mencement of the work . That by the proposals, the said persons and firms can ascertain their costs for the job, and the time for completion. That if said proposals are acceptable, a contract results.

That the prospective contractors, in accordance with said custom, cannot ascertain what the cost of labor will be nor the availability of labor, without executing a labor contract with the Union able to supply the requisite skilled mechanics in the numbers and at the times required.

II.

That Subcontract G-133 was entered into effective as of July 25, 1947, in contemplation of the Labor Agreement of August 15, 1947, as the said Local 370 had the only available pool of workmen required for the work to be done under the said Subcontract.

That the said Respondent during all times material to this proceeding was required on the said work to employ persons skilled at the crafts represented by the signatories to said agreement, the only available pool therefor being under the exclusive control of said signatories.

III.

That said Local 370 of the International Union of Operating Engineers and the other labor signatories to said labor agreement by custom and practice during all times material to this proceeding operated only under so-called "closed-shop" conditions and in close agreement with each other

whereby one craft would not enter into any agreement nor work on the job unless all of the other employees were covered by similar so-called "closed-shop" conditions.

IV.

That because of said customs, and the control over all of the manpower by Local 370 and by the other signatory labor Unions the Respondent was required to execute the Union security provisions of said agreement and to comply therewith.

That without said execution and compliance the work covered by said contract No. G-133 could not be performed by Respondent nor by any other contractor.

That all of said work is of vital necessity to the defense of the country.

Third Affirmative Defense

I.

That the NLRB has heretofore and does now refuse to accept jurisdiction over the work covered by the Respondent herein, and has refused and neglected to make any determination as to the appropriate bargaining unit and the representatives of such employees.

That until the NLRB accepts jurisdiction for said purposes, the General Counsel should be barred from filing and prosecuting this complaint.

Wherefore, Guy F. Atkinson Company and J. A. Jones Construction Co., Joint Venturers, having

fully answered the complaint of the General Counsel, pray that the same be dismissed.

/s/ KENNETH H. GEDNEZ,
Ass't General Manager.

Subscribed and sworn to before me this 13th day of October, 1948.

[Seal] /s/ E. A. KIGER,

Notary Public, in and for Benton County, State of Washington.

My Commission expires July 23, 1948.

Attn: W. C. Robbins, Manager, Contracts and Claims, Box 742, Richland, Washington.

[Admitted in evidence as General Counsel's Exhibit No. 1-G.]

[Title of Cause.]

ANSWER OF INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 370 AFL

Answering paragraphs I, II, III, IV, V, VI, and IX, we admit the same.

Answering paragraphs VII, VIII, X, XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII, we deny the same and the whole thereof.

First Affirmative Defense

I.

The said Chester R. Hewes did on or about October 27, 1947, enter into a contract with the said

Local 370 whereby he agreed to become and remain a member of Local 370 during the whole period of his employment with the said Respondent. That said contract is attached hereto as Exhibit I.

That, nevertheless, the same Hewes has violated the following provisions thereof:

A—Obligation

1. "remain a member until expelled or until I have been granted a withdrawal card.

2. "I will not violate any of the provisions of said constitution, Laws, and Rules governing the same."

3. "I further promise, in the event of a claimed grievance by me against the Local Union * * * that I will faithfully observe the procedure of and fully accept the findings of, the Final Board and Appellate Tribunals set up within the Local Union and said International Union."

4. "I further promise that I will not become a part to any suit at law or in equity against this Local Union * * * until I have exhausted all remedies allowed to me by the said Constitution. * * *"

B—Application for Membership

1. "I will remain a member until expelled."

2. "I will not enter into or sign any individual contract of employment * * * which provides for the withdrawal of my membership from this Union;"

3. "I further agree in the event of a claimed

grievance against the Union to faithfully observe the procedure of, and fully accept as final the findings of the Trial Boards within the order;"

4. "I hereby expressly waive any right to institute proceedings in any court of law or equity against the Union;"

5. "I further agree to conform to and abide by all laws, rules, and regulations and orders stipulated in the Constitution and By-laws, or given by those in authority."

6. "I also agree to pay an entrance fee of 40% of $100 which shall include dues in advance. I further agree that this entrance fee shall be fully paid by 30 days from date (October 27, 1947.)"

II.

That relying upon said contract with Hewes, and other similar contracts with other employees desiring employment under the jurisdiction of Local 370, Local 370 did expend a large sum of money in securing an available pool of workers available to work at the job of Heavy Duty Mechanic; and concurrently the said Local 370 did engage in collective bargaining with the Respondent and other similar contractors for the purpose of securing work for such persons.

III.

That in consideration and relying upon said contract, the said Local 370 did dispatch the said Hewes to the job of the Respondents as a Heavy Duty Mechanic.

IV.

That the said Hewes did not comply with any of the conditions thereof in accordance with the said contract, and he was thereafter and therefor removed from the job.

Second Affirmative Defense

I.

That the said Hewes did on or about October 27, 1947, designate Local 370 as his sole and exclusive collective bargaining agency, which has never been revoked and has been in effect at all times material to this proceeding.

Third Affirmative Defense

I.

That the Respondent is not engaged in "Commerce," nor does its said operations "affect commerce" within the meaning of the NLRA as Amended.

II.

That it would not effectuate the purposes of the NLRA as Amended for the NLRB to assume jurisdiction over the Respondent in its said activities.

Fourth Affirmative Defense

I.

That the work performed by Respondent is known as building trades construction work. That by custom immemorial in the industry, persons and firms desiring said work to be done require the execution of contracts well in advance of the commencement of the work. That by the proposals, the

said persons and firms can ascertain their costs for the job, and the time for completion. That if said proposals are acceptable, a contract results.

That the prospective contractors, in accordance with said custom cannot ascertain what the cost of labor will be nor the availability of labor, without executing a labor contract with the Union able to supply the requisite skilled mechanics in the numbers and at the times required.

II.

That the said No. C-133 contract of July 25, 1947, was entered into in contemplation of the labor agreement of August 15, 1947, as the said Local 370 has the only available pool of workmen required by said No. C-133 contract.

That during all the times material to this proceeding the said Respondent was required on said job to employ persons skilled at the crafts represented by the other signatories to said agreement, the only available pool therefor being under the exclusive control of said signatories.

III.

That said Local 370 and the other labor signatories to said labor agreement by custom and practice during all times material to this proceeding operated only under so-called "closed-shop" conditions and in close co-operation with each other whereby one craft would not enter into any agreement nor work on the job unless all of the other employees were covered by similar so-called "closed-shop" conditions.

IV.

That because of said customs, and the control over all of the manpower by Local 370 and by the other signatory labor Unions the Respondent was required to execute the Union security provisions of said agreement and to comply therewith.

That without said execution and compliance the work covered by said No. C-133 contract could not be performed by Respondent nor by any other contractor.

That all of said work is of vital necessity to the defense of the country.

Fifth Affirmative Defense

I.

That the NLRB has heretofore and does now refuse to accept jurisdiction over the work covered by the Respondent herein, and has refused and neglected to make any determination as to the appropriate bargaining unit and the representatives of such employees.

That until the NLRB accepts jurisdiction for said purposes, the General Counsel should be barred from filing and prosecuting this complaint.

Sixth Affirmative Defense

I.

That the work performed by the said Hewes is within the Espionage laws of the United States and is considered by the Atomic Commission as being highly secret. That Local 370 has not been able to acquire the information with respect to the

full nature of his work, and the NLRB will not permit the disclosure nor the acquisition of said information. That without said information, the said Local 370 is prejudiced in its defense in this case.

Wherefore, the International Union of Operating Engineers, Local 370 AFL, having fully answered the complaint of the General Counsel prays that the same be dismissed.

/s/ L. PRESLEY GILL,
Attorney.

State of Washington,
County of King—ss.

Arthur A. Rossman, being duly sworn on oath, deposes and says:

That I am the duly elected, qualified and acting business manager of International Union of Operating Engineers, Local 370, AFL, one of the parties herein; that as such officer I am authorized to execute this affidavit;

That I have read the within and foregoing answer of said Union, that I know the contents thereof and verily believe the same to be true.

/s/ ARTHUR A. ROSSMAN.

Subscribed and sworn to before me, this 15th day of October, 1948.

[Seal] /s/ LEILA BIRCHER,
Notary Public in and for the State of Washington, residing at Spokane.

[Admitted in evidence as General Counsel's Exhibit 1-H.]

Before the National Labor Relations Board
Nineteenth Region

[Title of Cause.]

AMENDED ANSWER OF GUY F. ATKINSON COMPANY AND J. A. JONES CONSTRUCTION CO.

Comes Now the Respondent to amend its answer dated October 13, 1948, in the above-entitled case, in the following particular only:

The First Affirmative Defense of Respondent is hereby deleted and stricken out in its entirety; with the exception of the foregoing amendment, the answer of Respondent shall remain as written.

/s/ KENNETH H. GEDNEZ,
Assistant Manager.

Subscribed and sworn to before me, this 15th day of October, 1948.

[Seal] /s/ E. A. KIGER,

Notary Public in and for Benton County, State of Washington.

My Commission expires July 23, 1950.

Attn: W. C. Robbins, Manager, Contracts and Claims, Box 742, Richland, Washington.

[Admitted in evidence as General Counsel's Exhibit 1-I.]

Received October 20, 1948.

[Letterhead]

International Union of Operating Engineers
Washington (1), D. C.

Office of the General President

June 2, 1949.

Dear Mr. Herzog:

This letter refers to Case No. 19-CA-28 in which are involved Local Union No. 370 of this organization—the International Union of Operating Engineers—and Guy F. Atkinson Company and J. A. Jones Construction Company.

Very likely you already have before you the Intermediate Report as written by Trial Examiner Ward, together with a copy of the "Exceptions of Engineers Union Local 370" which latter document, I understand, has been distributed among the several parties at interest.

The case is one of more than ordinary interest and it seems to me one in which, if the Trial Examiner is upheld a precedent will be established which will in the future rise up not only to plague organizations of labor and employers of labor but well may haunt the National Labor Relations Board itself. I do not here discuss the issues nor do I set forth the case in detail. That can better be done by the documents you have before you.

In extreme brevity the case is simply this: Over many years it has been the well established practice—so well established that it has become accepted as a principle—that labor contracts covering con-

struction operations have been negotiated and consummated prior to the beginning of construction activities. This is a sound practice for it readily appears that were negotiations deferred until work had begun the contractors would enter upon projects with but little idea of the wages they were to pay, the conditions under which they were to work and so on through a considerable list not necessary here to set forth. The results might well be, in such instances, bankrupted contractors, deeply dissatisfied employees and a ruptured local economy.

The Intermediate Report of Trial Examiner Ward negates the thoroughly recognized practice. It appears to be based, in considerable part, on the ground that the labor contracts with the contractors were entered in to before the beginning of the actual work of construction. If the Intermediate Report is upheld by the Board the situation not only with respect to organizations of labor but with respect to the entire construction industry must become grave indeed.

Because of the importance of this case and the far reaching effects of the Intermediate Report an oral argument before the Board becomes a highly desirable consideration. Request for such argument is both earnestly and respectfully made by this letter. I hope I may have an affirmative reply from you.

With the best of personal wishes, please believe me to be with cordial regards

Yours very sincerely,

/s/ HERBERT WOODS,

Director of Research for Wm. E. Maloney, General President.

Paul M. Herzog, Chairman,
National Labor Relations Board,
815 Connecticut Avenue,
Washington, D. C.

HW/mll

Filed in formal file.

Before the National Labor Relations Board
Division of Trial Examiners

[Title of Cause.]

EXCEPTIONS OF GUY F. ATKINSON COMPANY AND J. A. JONES CONSTRUCTION COMPANY, RESPONDENT

Respondent excepts to the Intermediate Report of the Trial Examiner as follows:

1. The Trial Examiner has found that Respondent is engaged in Interstate Commerce within the meaning of the Act and holds that the Board has and should assume jurisdiction of the instant matter. (Page 5, Line 35, Intermediate Report.)

Respondent excepts to that part of the Trial Examiner's findings which holds that the Board should assume jurisdiction and respectfully urges

that the Board decline to assume jurisdiction for the reasons set forth below:

a. The issue was raised as No. 1 of Defenses in the Supporting Brief of Respondent.

b. The Board may refuse to assume jurisdiction when in its opinion "The assertion of jurisdiction would not affectuate the policies of the Act." H. F. Smith, d.b.a., A-1 Photo Service, 83 NLRB 86.

In the language of the Board in the A-1 Photo Case (Supra):

> "For the above reasons we find contrary to the General Counsel's contention that the Board has discretionary authority to dismiss complaints for policy reasons even though commerce is affected." (See, also, Fred Montgomery d.b.a., Pereira Studio, 83 NLRB 87.)

The Trial Examiner has cited on this point, In re: Brown & Root, Inc., 77 NLRB 436, as authority for the assumption of jurisdiction by the Board in construction cases. Respondent respectfully suggests that the Board's decision to assume jurisdiction in the Brown Case may have been influenced by factors which are not present in the subject case, to wit: In the Brown case the Board found that:

> "Stoppage of work on the Bull Shoals dam—would delay the production of electricity which will probably be sold in Interstate Commerce."

In the present case, it is expressly provided by statute that the products to be derived from the use of facilities built in the construction program

at Hanford Works are at all times property of an instrumentality of the United States Government and never enter the stream of Interstate Commerce. (Atomic Energy Act 1946, Title 42 USCA 1801.)

* * *

3. The Trial Examiner has ruled (Page 12, Intermediate Report) that Hewes' discharge was effected by Respondent in reliance upon an illegal contract and hence the provisions of that contract may not be relied upon by Respondent as a defense to its action. Respondent excepts to this ruling as follows:

a. It is not demonstrated by the record that on August 16, 1947, "The Engineers did not represent any employees of the Respondent in an appropriate unit." To the contrary testimony adduced at the hearing clearly indicates that a substantial number of Respondent's manual employees were doing work within the asserted jurisdiction of Engineers. (See Molthan's testimony cited to Official Transcript under (2) above.)

b. Contract of August 16, 1947, was entered into with the several Building Trades Unions by Respondent in reliance upon Respondent's extensive "prior" experience in the heavy construction field. (Molthan—Page 130 Off Trans.)

c. In entering into the contract of August 16, 1947, Respondent was effectively required to depend upon the jurisdictional assertions of the several unions signatory thereto. (Molthan —Page 131 Off Trans.)

d. The Contract of August 16, 1947, was en-

tered into by Respondent at a time when it had no actual knowledge of any claims of machinists. (Molthan—Pages 131 and 132 Off Trans.)

e. Hewes' discharge was effected by Respondent pursuant to the terms of its contract of August 16, 1947, with the Engineers, only after close scrutiny by, and the reliance upon the opinion of competent counsel. (Molthan—Pages 108-109 Off Trans.)

4. The Trial Examiner has found that Respondent has "enforced its illegal recognition of the Engineers—by the discharge of Hewes and other employees on February 18, 1948. (Page 15, Line 31, and Page 16, Line 34, Intermediate Report.)

a. Respondent excepts to the above finding in toto, and specifically to the implication that other employees were discharged in the same manner as was Hewes. The present charge before the Board is concerned solely with the facts surrounding Hewes' discharge; nor does the record indicate that other employees were discharged.

5. The Trial Examiner has recommended that Respondent re-instate Hewes to his former or substantial equivalent position.

"without prejudice—and make him whole for any loss of pay—by payment to him of a sum of money equal to that he would normally have earned as wages from the date of his discharge to the date of Respondent's offer of reinstatement, less his net earnings during such period."

Respondent excepts to all of the above, and specifically excepts to the extent that the holding of the Trial Examiner assumes that the alleged discrimination has continued to the present. The record indicates that the contract (G. C. Exhibit No. 5) expired August 10, 1948 (Molthan—Page 112 Off Trans). Since that date Respondent has operated under a contract which requires National Labor Relations Board authorization of Agency on Union security (Hewes Exhibit 1).

Hewes has been free to apply for employment in his former position at any time, but to the best of Respondent's knowledge has failed so to do (Hibberd—Pages 69 and 70 Off Trans), nor did the condition of Hewes' discharge prohibit his re-employment at any time since August 10, 1948. (Hibberd—Page 69 Off Trans.)

6. The Trial Examiner denied Respondent's Motion to Strike (Page 3, Line 22 Off Trans) certain testimony relevant to "jurisdictional aspects" and deemed by Respondent to be irrelevant to the issues to be considered in the instant matter. Respondent excepts to the ruling above, as follows:

a. Much testimony was adduced by Hewes, Engineers, and the General Counsel which intended to demonstrate that work performed by "Heavy Duty Mechanics," "Heavy Duty Mechanics Specialists" (Respondent's Job Classifications) was in fact similar to work normally done by "Machinists" (Hewes' designation).

Note—See, also, Paragraph XII of the Complaint, and further Motion of Respondent directed toward this paragraph. (Pages 38 and 39 Off Trans.)

Respondent excepts specifically to Trial Examiner's refusal to strike testimony as follows:

(Refer to pagination of Official Transcript)

1. Pages 81 through 86.
2. Page 99.
3. Pages 115 through 117.
4. Page 140 (Mr. Eagen's Question).
5. Page 155.
6. Page 163 (Mr. Eagen's recross-examination).
7. Pages 173 through 187 (Mr. McBurnie's testimony).
8. Pages 190 through 193 (Mr. Dewing's testimony).
9. Pages 245 through 249.
10. Pages 254 through 257 (Mr. Clarke's testimony).

The above testimony was admitted over exceptions by the Respondent that the jurisdictional claims of the respective Unions were presently scheduled to be heard in an appropriate forum (See, also, Engineer's offer of proof, Page 251 Off Trans).

Respondent should not be penalized for having acted in good faith in entering into a contract with the Engineers at a time when no actual knowledge of machinists interest existed. As was shown by

the testimony, methods of settling jurisdictional problems exist within the province of the labor organizations themselves, and machinery is provided whereby the National Labor Relations Board may make a proper determination. The jurisdictional problems of the machinists and Engineers were schedules for hearing at the time the instant unfair labor practice charge was heard, and the matter of the conflicting jurisdictional claims has since been heard although no decision has as yet been handed down by the Board.

The Board has recently stated (Los Angeles Building Trades Counsel, 83 NLRB 76), in a case involving conflicting jurisdictional claims of machinists and millwrights that the Board will not usurp the Employer's right to "award work" as he sees fit.

> "In reaching this conclusion we are aware that the employer in most cases will have resolved, by his own employment policy, the question as to which organization shall be awarded the work. Under the statute as now drawn, however, we see no way in which we can, by Board reliance upon such factors as tradition or custom in the industry, overrule his determination in a situation of this particular character."

The facts are not basically dissimilar from the instant case, and the reasoning of the Board may be well applied with equal vigor here. In effect, Respondent made an assignment of work by contract, the propriety of the assignment is challenged

and Respondent penalized—not through the medium of the machinery established by statute for that purpose but rather through an Unfair Labor Practice charge, which seeks to pre-try issues properly determinable elsewhere.

The Respondent excepts to the ruling of the Trial Examiner that Respondent's good faith does not constitute a defense.

It has been demonstrated by the Record that Respondent in contracting with the Engineers followed a pattern of procedure which has been established by long custom in the construction industry. Further, that the exigencies of the construction program made necessary the immediate manning of the job to the greatest extent possible within a limited time; that Respondent served the best interest of its Prime Contractor and the Atomic Energy Commission by assuring an adequate labor supply by the only means available to it; that its contract with the Engineers was entered into for the sole purpose of accomplishing the purpose of its letter Subcontract G-133 with lack of knowledge of any interest of the machists in the premises and with no intent to prejudice the rights of any individual or labor organization.

GUY F. ATKINSON CO., and
J. A. JONES CONSTRUCTION CO.,
/s/ WILLIAM C. ROBBINS.

Filed in formal file.

Before the National Labor Relations Board

[Title of cause.]

EXCEPTIONS OF ENGINEERS UNION LOCAL 370

The Engineers Union Local 370, hereinafter referred to as the Engineers, excepts to the Intermediate Report as follows:

* * *

The Trial Examiner erred in ruling that the Engineers had no members employed at the time of the contract—page 5, line 20; page 12, line 3. He relied on the testimony of respondent's James Moulthan who was, in the quoted excerpt (page 10, line 22) referring to the general practices.

The record shows that the Engineers had members employed at the time of negotiating and executing the contract:

James Moulthan testified, at page 150, that the employer received the Letter Orders G-133 on July 28, 1947, and that the first employes were hired the next day, July 29, 1947. At pages 152-7 he testified that the first employes on the job were engineers, common laborers, and teamsters in the ratio of about one-third each, and that they needed 1,000 of those men immediately. Moulthan, referring to the payroll exhibits, testified on page 125 that on August 16, 1947, the date the contract was signed, the employer had 103 manual employees of whom two were heavy duty mechanics. In accordance with his other testimony, related before, the 103 em-

ployes would be divided approximately 33 members of the Engineers Union. This refutes the Trial Examiner's report that on that date the union had no members employed.

3. Refusing to Dismiss the proceedings because the gist of the complaint is that the Engineers were not the bargaining agency for an appropriate unit in that the NLRB has heretofore refused to accept any jurisdiction over representation questions at the Hanford job.

Clarke testified (p. 230) that Local 370 has filed 9 petitions for union security authorization and has been informed that the NLRB will decide in the Spring of 1949 whether to process these petitions.

Further proof was rejected as shown by the offers:

(a) Local 370 wanted Exhibit 4 reserved (p. 234) for a recital of "R"—petitions filed since the Hanford project commenced. The General Counsel refused to make this information available, and the Trial Examiner refused to receive the Exhibit. Offer appears on page 234 (a stenographic error appears by incorrectly stating that the witnesses are not in attendance).

(b) An offer explaining the reason for filing U A petitions was rejected (p. 242).

These offers show that for five years the NLRB has refused to process R—petitions. In this Affirmative Defense we assert that the general Counsel should be barred from contending that Respondent and Local 370 fixed a bargaining unit and that Re-

spondent recognized an agency which the Board has always refused to determine.

During the period that the Board refuses to decide right and wrong, the General Counsel should be barred from prosecuting what appears to him to be a wrong.

4. Refusing to Dismiss the proceedings on the ground that Hewes, the charging party, agreed to the discharge.

The membership card of Hewes appears as Local 370 Exhibit 3. This obligated Hewes to pay his initiation fee of $40 within 30 days after November, 1947. The obligations permitted removal from the job for non-compliance.

This is not a case of Local 370 removing a non-member from the job. Hewes went to the union for a job and was referred to Respondent after he acknowledged his obligations to Local 370.

The Respondent would have spent 2 or 3 million dollars recruiting manpower in the absence of the contract (G. C. Ex. 5—Moulthan p. 141). Local 370 incurred a portion of this expense. The job required 1,000 men immediately of which one-third were engineers—Moulthan p. 155-7. These expenditures furnished the consideration for the contract with Hewes—Local 370 Ex. 3.

5. Refusing to find that a national emergency required the execution and compliance with the labor agreement of August 16, 1947.

Letter Order G 133 dated July 25, 1947, authorized a joint venture under the name of the Respondent to enter upon a construction job.

There was extreme urgency and insufficient time to prepare a subcontract for Respondent.

Moulthan 129, 149, 155-7, 161.

* * *

8. The Trial Examiner assumes that the alleged discrimination has continued without interruption.

The current contract (Hewes Ex. 1) took effect August 11, 1948—Moulthan 112. G. C. Exhibit 5 expired midnight August 10, 1948.

The current contract requires NLRB authorization of agency and union security (Hewes Ex. 1)—Moulthan 145 and is open shop in form.

The job has been open shop since August 10, 1948, and no employee is required to get union clearance.

Moulthan 145, 11-2

Hibberd 81

Hewes has not since February 18, 1948, asked for his job back.

Hibberd 69-70, 81

Hewes was not discharged on the basis that he would never be re-hired.

Hibberd 69-70, 81

G. C. Exhibit 10—Lay-off card.

9. The Trial Examiner erred in finding that the Machinists Union had jurisdiction over the work of Hewes and that Hewes was dispatched as "Machinist (specialist)."

By long custom the Engineers have always repaired their own equipment—Moulthan 155.

The AFL, at its New Orleans Convention in 1944

without the objection of the IAM delegates, awarded to the Engineers exclusive jurisdiction over repair, maintenance and machine work at the site of construction. This resolution appears in Local 370 Exhibit 4, in the Rejected file.

There is no question but the work of Hewes and "3,000 Shop" was at the site. Hewes could see the construction equipment being operated by Local 370 members 50-75 yards from the Shop—McBurnie 180.

Hewes was hired as a heavy duty mechanic.

Local 370 gave a 60% credit on initiation fee to members of other unions—Clarke 217. The word "machinist" and "Machinist Specialist" was written on Union records to show justification for the credit—Clarke 217, G. C. Ex. 8.

However, the words "machinist specialist" was written on the Introduction card, G. C. Ex. 13, by mistake of the "office girl"—Clarke 213.

The union had no such jobs as "machinist," "machinist specialist," or "heavy duty mechanic specialist"—Clarke 213.

Hewes testified that the obliteration of "machinist specialist" on his Introduction Card, G. C. Ex. 13, was not present when he turned in the card to Respondent's personnel office—Hewes 198.

The first form filled by all employees is a confidential Security form which is retained by G. E. The second form was G. C. Ex. 16—Hibberd 72. This form was filled by the person who had received the Introduction Card. All job blanks on G. C. Ex. 16 listed "heavy duty mechanic 39-1."

Hewes was hired as heavy duty mechanic or welder at the rate of $1.85 under Schedule A of G. C. Ex. 6; he was not hired as machinist specialist, nor as machinist; and he worked at all times as heavy duty mechanic—Hibberd 73-75.

There was no job as machinist and none hired as such—Hibberd 83.

10. The Trial Examiner erred in finding that persons other than Hewes were discharged, in his statement at the bottom of page 7 as Note 10. The letter of February 16 listed Hewes and other employees to be discharged. This letter was withdrawn and a special letter on the same date was sent asking for the discharge of Hewes. On page 109, Moulthan stated that separate letters were also sent covering the other employees who had been listed in the first letter. Moulthan did not state that these other employees were discharged. Moulthan states that he made a personal investigation of each request which resulted in a discharge and he only described an investigation for Hewes. There is not a word in the transcript indicating that any person other than Hewes was discharged.

11. The Trial Examiner erred in not dismissing the proceedings and in not finding that the contract of August 16, 1947, complied with the proviso of the Taft-Hartley Law which permitted the execution of closed shop agreements for a period not longer than one year if such agreements were executed prior to August 22, 1947. The closed shop clause was legal under the Taft-Hartley Law, and

the discharge of Hewes was, therefore, justified on the basis of the contract.

Wherefore, the Engineers Union, Local 370 asks that the complaint be dismissed.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 370 AFL,

By L. PRESLEY GILL,
Its Attorney.

May 27, 1949.

Received June 27, 1949.

Before the National Labor Relations Board
Division of Trial Examiners

[Title of Cause.]

SUPPLEMENTAL EXCEPTIONS OF GUY F. ATKINSON COMPANY AND J. A. JONES CONSTRUCTION COMPANY, RESPONDENT

Respondent further excepts to the Intermediate Report of the Trial Examiner as follows:

1. The Trial Examiner has found that Respondent might not properly enter into a Collective Bargaining Agreement with the Engineers on August 16, 1947, by reason of the fact that the testimony does not disclose that the Engineers represented any employees of the Respondent in an Appropriate Unit.

Respondent respectfully urged that the ruling of

the Trial Examiner overlooks the historical pattern of labor contracting followed by Western Contractors and Labor Organizations for many years. Deriving from the geographic isolation of many major construction projects in this section of the country, the pattern of pre-job conferences arose as a solution to the problems of both contractors and labor organizations for successfully manning jobs in isolated areas. Heavy construction contractors depended upon the manpower solicitation of the Unions which were so organized as to be able to procure labor from urban centers, often very removed from the jobsite.

The meetings held between representatives of Respondent and the several Unions signatory to the Collective Bargaining Agreement of August 16, 1947, represented the historically accepted, and only practicable method by which necessary skilled labor could be obtained. In effect the Trial Examiner's ruling condemns this custom, yet had Respondent refused to enter into a Collective Bargaining Agreement with the several labor organizations representing the crafts involved in the work until such time as a unit determination could have been made pursuant to election, Respondent might have risked a charge that it had failed to bargain in good faith along the lines of a precedent formerly established by both the construction industry and the Building Trades Unions.

Molthan's Testimony of Cross-Examination by Mr. Walker (Page 128 TR):

> "A. That was our project at the time we negotiated the present contract which is under

attack here. We relied upon the Building Trades Department of the American Federation of Labor to man that job. When we came into the Hanford area, we had no Associated General Contractors area agreement for our purpose. Ordinarily the Associated General Contractors will negotiate area agreements and then members coming into the area to do any kind of work, build a dam, a highway or a tunnel, avail themselves of that agreement. The Spokane Chapter of the Associated General Contractors exercises what, I imagine, a Union would term jurisdiction over the area in which the Hanford Works are set up. They had no agreement for our purposes, so it was necessary for us to negotiate an agreement, and we went into the—to the International Unions with whom we always do our business and asked through the agency of Mr. Harry Aimes, who is Executive Secretary of the Washington State Department of the Building Trades and Construction Department of the American Federation of Labor, to arrange for our meeting with all the representatives, International or Local, that could be made available to us on short notice * * *"

The Trial Examiner's ruling represents a threat to an established practice which has made possible the manning and orderly administration of labor relations on projects such as the Hungry Horse Dam, McNary Dam, Detroit Dam, Ross Dam, large Army and Navy base construction projects by

major construction concerns who would have been seriously jeopardized in their competitive bidding on further government projects had they been unable to rely upon this custom.

Area Agreements are entered into by individual chapters of the Associated General Contractors of America, Inc., with the several Building Trades Unions to establish job conditions within a jurisdictional area and which subsists usually for one year. Pursuant to the terms of most area agreements, special job agreements are contemplated to take care of particular circumstances surrounding individual jobs. Inability on the part of the contractor and the several crafts to discuss conditions and requirements and to reduce their understandings to an agreement prior to the start of work would seriously prejudice both labor and contractor.

The following is an extract for a typical AGC Agreement and cited as Portland Chapter AGC with International Union of Operating Engineers, Local 701, Portland 1949:

> "This agreement, insofar as work affected by it is concerned, shall supersede any existing agreements between the parties hereto who shall be concerned, but this clause shall not be interpreted as in any way affecting such existing agreement with respect to work not covered by this agreement.
>
> "Special Job Agreements may be negotiated between Contractors and Unions who are or who become parties to this agreement, when such Special Job Agreements are deemed ad-

visable because of the size, duration, location or other characteristics of the particular project involved. The terms of such Special Job Agreements shall be as consistent as parcticable with the terms of this agreement."

Respondent urges that the Board consider the exception and argument presented above and further requests that in view of the affect that the Trial Examiner's ruling will exert on the entire industry, the Board remand the instant case to the Trial Examiner for the taking of further testimony relative to this point.

GUY F. ATKINSON COMPANY AND J. A. JONES CONSTRUCTION CO.,

/s/ WILLIAM C. ROBBINS.

Received July 26, 1949.

United States of America
Before the National Labor Relations Board

[Title of Cause.]

NOTICE OF HEARING

Oral argument previously scheduled for August 11, 1949, in the above-entitled proceeding having been postponed indefinitely by telegram dated August 5, 1949,

Please Take Notice that pursuant to authority vested in the National Labor Relations Board under the National Labor Relations Act, as amended,

(Public Law 101—80th Congress, 1st Session), a hearing will be held before the National Labor Relations Board on Monday, December 19, 1949, at 10:00 a.m. in the Hearing Room 2030, Federal Security Building, South, C Street between 3rd and 4th Streets, Southwest, Washington, D. C., for the purpose of oral argument in the above-entitled matter. Argument will be limited to one-half hour for each of the following parties:

Guy F. Atkinson Co., a corporation, J. A. Jones Construction Co., a corporation, d/b/a Guy F. Atkinson Co., and J. A. Jones Construction Co.

Chester R. Hewes.

International Union of Operating Engineers, Local 370, AFL.

General Counsel, National Labor Relations Board.

The following parties will be permitted to participate in the oral argument as amici curiae; their argument will be restricted however to the general problems of Board jurisdiction in the Building and Construction industry and problems relating thereto:

Building and Construction Trades Department, American Federation of Labor.

Associated General Contractors of America.

Gardiner Johnson, 111 Sutter Street, San Francisco 4, California.

Dr. John Dunlop, Harvard University, Department of Economics, Cambridge, Mass.

National Constructors Association, Davies, Hardy, Schenck & Sons, One Wall Street, New York 5, New York.

International Association of Machinists, Att.: M. S. Ryder, Esquire, Ninth and Mount Vernon Place, N.W. Washington 1, D. C.

Should any party or organization listed above decide not to appear, such party or organization should immediately notify the Board.

Dated, Washington, D. C., December 5, 1949.

By direction of the Board:

/s/ LOUIS R. BECKER,
Acting Executive Secretary.

Filed in Formal File.

United States of America
Before the National Labor Relations Board

Case No. 19-CA-28

In the Matter of

GUY F. ATKINSON CO., a Corporation, and J. A. JONES CONSTRUCTION CO., a Corporation, d/b/a GUY F. ATKINSON CO. AND J. A. JONES CONSTRUCTION CO.

and

CHESTER R. HEWES.

DECISION AND ORDER

On May 12, 1949, Trial Examiner Peter F. Ward issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices,[1] and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other alleged unfair labor practices, and recommended that those allegations of the complaint be dismissed.

[1]The Trial Examiner found that the Respondent had violated Section 8(1) of the original Act and Section 8(a) (1) and (3) of the amended Act. Those provisions of Section 8(1) which the Trial Examiner found the Respondent had violated are continued in Section 8(a) (1) of the amended Act.

Thereafter, the Respondent filed exceptions and supplemental exceptions to the Intermediate Report; Local 370, International Union of Operating Engineers, A.F.L., filed exceptions and a brief in support of its exceptions; and Hewes, the charging party, filed a brief in support of the Intermediate Report. Thereafter, the Board permitted the Building and Construction Trades Department, A.F.L., and the Associated General Contractors to file briefs, as amici curiae, bearing on certain related matters, many of which are not decided here.

On the morning of December 19, 1949, the Board at Washington, D. C., heard oral argument in which certain of the above-named parties and the General Counsel participated. The latter's representative argued in support of the Intermediate Report.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, the contentions advanced at oral argument, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:

1. We find, as did the Trial Examiner, that the operations of the Respondent affect commerce, and that the policies of the Act will be effectuated by the exercise of our jurisdiction.

Although the briefs of the Respondent and the Operating Engineers point to the non-assertion of

jurisdiction over construction projects under the original Act, such abstention was an administrative choice rather than a legal necessity,[2] and does not stop our present exercise of jurisdiction.[3] Indeed, since 1947, under the amended Act, we have asserted jurisdiction over substantial construction projects, including this very project.[4] And in taking jurisdiction over this project, we said:

> We have previously indicated our disposition to assume jurisdiction over concerns engaged in construction projects similar to the one in the case before us. Moreover, the magnitude of the operations leaves little doubt as to their substantial effect upon interstate commerce.

We, therefore, cannot accept the contentions addressed to the Board's jurisdiction or its exercise thereof.

[2]Ozark Dam Constructors, 77 NLRB 1136.

[3]N.L.R.B. v. Baltimore Transit Company, 140 F. 2d 51 (C.A. 4) cert. den. 321 U. S. 795.

[4]Ozark Dam Constructors, supra; Daniel Hamm Drayage Company, Inc., 84 NLRB No. 56; Guy F. Atkinson Company and J. A. Jones Construction Company, 84 NLRB No. 12; Starrett Brothers and Eken, Inc., 77 NLRB 275. In another case involving this project (83 NLRB No. 142) the issue of jurisdiction was not raised.

The Respondent's further contention, that jurisdiction should not be asserted here because the product of the Hanford atomic energy works is at all times the property of an instrumentality of the Government and never enters into commerce, is without merit. Monsanto Chemical Company, 76 NLRB 767.

2. Like the Trial Examiner, we must find that the closed-shop contract of August 16, 1947, between the Respondent and the Operating Engineers[5] is not a valid defense to the discharge of Chester R. Hewes[6] on February 19, 1948.

The contract in question was entered into on August 16, 1947, for a 1-year term. As this date fell between the enactment date and the effective date of the amended Act, we must, under Section 102 of that amended Act,[7] determine its availability as a

[5]The Operating Engineers was one of the signatory unions to this contract which included numerous unions affiliated with the Building and Construction Trades Department, A.F.L.

[6]The Respondent and the Operating Engineers except to the Trial Examiner's finding that several other employees had been discharged pursuant to this contract. The exceptions are well taken, as this finding is unsupported by the record. However, our rejection of this finding has no impact upon the issues presented herein.

[7]Section 102, insofar as here applicable, provides: "* * * the provisions of Section 8(a) (3) and Section 8(b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligtaion under a collective-bargaining agreement entered into prior to the date of enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under Section 8(3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

substantive defense under the original act.[8] Our decision in this case, therefore, does not turn upon, or construe, the substantive terms of the present statute.

The proviso to Section 8(3) of that 1935 statute states, in relevant part:

> "* * * nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

Pertinent to the issue here, therefore, is whether the contracting union was the statutory representative of the employees in an appropriate unit when the agreement was made. On all the facts, we find, as did the Trial Examiner, that it was not.

On August 16, 1947, the project, which was known to be a very extensive one, was in its early stages. There were at that time 125 manual employees, in-

[8]Daniel Hamm Drayage Company, Inc., 84 NLRB No. 56; Chicago Freight Car & Parts Co., 83 NLRB No. 167.

No issue is, or could be raised here because the August, 1947, contract was executed without the conduct of a union shop election under Section 9(e) of the amended Act.

cluding 10 operating engineers. In contrast, as of December 31, 1947, the work force had grown to 5,400 manual employees, of whom 740 were operating engineers. It is thus clear, without considering further increments thereafter[9] and without attempting to determine the scope of an appropriate unit, that in virtually all categories, including that of the operating engineers, the work force at the time the contract was signed was not at all representative of that shortly to be employed. Under these circumstances, the union could not have been, as required by the proviso to Section 8 (3), the representative of the employees in an appropriate unit.

It is contended, however, that these principles are not applicable, because the manner in which the contract here was executed was and is customary in the construction industry. We have previously held that we cannot assume the power to give effect to a custom which is contrary to the statute.[10] In writing the proviso to Section 8 (3), and even its counterpart in the amended Act, Congress made no exception based upon custom in any industry. We must, therefore, apply the Act as written, without engrafting administrative exceptions upon it.[11]

[9]In May, 1948, a peak of 9,900 manual employees was reached, and at no time during 1948 did employment drop below 8,400 manual employees.

[10]National Maritime Union of America, 78 NLRB 971.

[11]Cf. Colgate-Palmotive-Peet Co. v. N.L.R.B., 338 U. S. 355.

The Respondent and the Operating Engineers

Nor does the fact that this Respondent may well have acted in good faith or in the presence of what it considered a national emergency constitute a sufficient legal defense. As the Trial Examiner found, the Congress made no exceptions for either good faith or economic exigencies which may seem to an employer to justify his violations[12]

Equally without effective merit is the Respondent's contention that, had it not entered into the contract, it would have been subject to a charge of refusal to bargain. The very reasons for which we are holding the union not to have been the representative of the employees would have constituted a valid defense to such a charge.

We therefore find, as we necessarily have found with respect to other contracts executed under similar circumstances,[13] that the contract relied on as a defense to the discharge of Chester R. Hewes does not fall within the protection of the proviso

contend that the Board is precluded from questioning the contract in view of the limitation to the Board's 1948 appropriation. We agree with the Trial Examiner that, the rider having expired, the limitation is not here applicable. Kinner Motors, 57 NLRB 622; cf. N.L.R.B. v. Thompson Products, 141 F. 2d 794 (C. A. 9). We therefore find it unnecessary to pass upon the various other bases on which the Trial Examiner found this contention to be without merit.

[12]N.L.R.B. v. Star Publishing Co., 79 F. 2d 465 (C. A. 9).

[13]Daniel Hamm Drayage Company, Inc., supra; Chicago Freight Car & Parts Co., supra.

to Section 8 (3) of the original Act.[14] The discharge pursuant to that contract was consequently violative of Section 8 (a) (3) and 8 (a) (1) of the amended Act,[15] as the Trial Examiner found.

3. We find it unnecessary, in the absence of exceptions, to pass upon the Trial Examiner's dismissal of the 8 (2) allegations of the complaint.

[14]The complaint alleged, and the Trial Examiner found, the signing of the contract to be an independent violation of Section 8(1). However, as the contract was signed on August 16, 1947, and the charge was not filed until February 27, 1948, more than 6 months after the effective date of the Act, Section 10(b) precludes such a finding. Itasca Cotton Manufacturing Company, 79 NLRB 1442; Cathey Lumber Company, 86 NLRB No. 30. We shall, therefore, without disturbing the Trial Examiner's other 8(a) (1) findings, dismiss this allegation of the complaint.

[15]The fact that we did not choose to exercise jurisdiction over the construction industry under the original Act, carries no implication that had we asserted jurisdiction, we would not then have reached the same conclusion on an identical set of facts.

We find no merit in the contention that Hewes' application to membership in the Operating Engineers was a contract by which he agreed to the discharge in advance. Moreover, the Respondent did not discharge Hewes pursuant to his contract with the Operating Engineers, but in accordance with the Respondent's contract with the Operating Engineers.

Nor do we believe that it was Hewes' duty to seek reinstatement after August 10, 1948, when the closed-shop contract was no longer in effect. It is the employer's duty to remedy a discriminatory discharge by offering reinstatement. E. C. Brown Company, 81 NLRB No. 22.

Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Guy F. Atkinson Co. and J. A. Jones Construction Co., and its officers, successors, and assigns shall:

1. Cease and desist from:

(a) Recognizing International Union of Operating Engineers, Local 370, A.F.L., or any successor thereto, as the representative of any of its employees for the purposes of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(b) Performing or giving effect to its contract of August 16, 1947, with International Union of Operating Engineers, Local 370, A.F.L., or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board; excepting, however, that in no event shall this be construed as waiving any provisions of Sections 8 and 9 of the Act, as amended;

(c) Discouraging membership in International

Association of Machinists or in any other labor organization of its employees or encouraging membership in International Union of Operating Engineers, Local 370, A.F.L., by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment;

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Chester R. Hewes immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges;

(b) Make whole Chester R. Hewes for any loss of pay he may have suffered as a result of the Re-

spondent's discrimination against him by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the Respondent's offer of reinstatement, less his net earnings during said period;

(c) Post at its plant in Richland, Washington, copies of the notice attached hereto, marked Appendix A.[16] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

And It Is Further Ordered that the complaint be, and it hereby is, dismissed insofar as it alleges that by executing the August 16, 1947, agreement,

[16]In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted in the Notice, before the words "A Decision and Order," the words "A Decree of the United States Court of Appeals Enforcing."

the Respondent violated Section 8 (1) of the Act, and that the Respondent violated Section 8 (2) and Section 8 (a) (2) of the amended Act.

Signed at Washington, D. C., this 8th day of June, 1950.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

JAMES J. REYNOLDS, JR.,
Member.

ABE MURDOCK,
Member.

[Seal] NATIONAL LABOR RELATIONS BOARD.

Appendix A

Notice to All Employees
Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will withdraw and withhold all recognition from International Union of Operating Engineers, Local 370, A. F. L., as the representative of any of our employees at our Richland, Washington, plant, for the purposes of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of em-

ployment, unless and until said organization shall have been certified by the Board as the representative of such employees.

We Will cease performing or giving effect to our contract of August 16, 1947, with International Union of Operating Engineers, Local 370, A.F.L., covering employees at our Richland, Washington, plant, or to any modification extension, supplement, or renewal thereof, or to any other agreement, contract, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board, excepting, however, that in no event shall this be construed as waiving any provisions of Sections 8 and 9 of the Act as amended.

We Will Not in any like or related matter interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will offer to Chester R. Hewes immediate

and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed; and we will make him whole for any loss of pay suffered as a result of the discrimination against him.

GUY F. ATKINSON, and

J. A. JONES CONSTRUCTION CO.,

(Employer.)

By

(Representative.) (Title.)

Dated

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Filed in informal file.

Before the National Labor Relations Board
Division of Trial Examiners

[Title of cause.]

PATRICK H. WALKER,
For the General Counsel.

WILLIAM C. ROBBINS,
For the Respondent.

E. J. EAGEN,
For Hewes.

L. PRESLEY GILL, For the Engineers.

Before Ward: Trial Examiner.

INTERMEDIATE REPORT

Statement of the Case

Upon a charge duly filed February 27, 1948, by Chester R. Hewes, herein called Hewes, the General Counsel for the National Labor Relations Board[1] by the Regional Director for the Nineteenth Region, (Seattle, Washington), issued a complaint dated September 28, 1948, against Guy F. Atkinson Company, a corporation, J. A. Jones Construction Co. a corporation, doing business as Guy F. Atkinson Co. and J. A. Jones Construction Co., Richland, Washington, herein called the Respondent, alleging that the Respondent had engaged and was engaging

[1]The General Counsel and his representative at the hearing are referred to as the General Counsel and the National Labor Relations Board is referred to as the Board.

in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (2) and Section 2 (6) and (7) of the Act, prior to amendment, herein called the Act, and Section 8 (a) (1), (2), and (3) and Section 2 (6) and (7) of the Act as amended, herein called the Amended Act. Copies of the complaint, with charge attached and notice of hearing thereon, were duly served upon the Respondent, Hewes, and International Union of Operating Engineers, Local 370, AFL, Party to the contract, herein called the Engineers.

With respect to the unfair labor practices, the complaint alleged in substance that: (1) on or about August 16, 1947, Respondent entered into an agreement with the Building and Construction Trades Department of the AFL, of which the Engineers was a signatory union, which agreement as a condition of employment at its Richland operations, required its employees, as a condition of continued employment, to become and remain members of the Engineers; and that at the date of the execution of said agreement the Engineers did not represent a majority of the employees at Respondent's Richland operations within an appropriate unit, nor in any unit of Respondent's employees at such operations that was appropriate for collective bargaining; the agreement above referred to was executed and made effective by Respondent at a time when the International Association of Machinists, herein called IAM, had given to Respondent actual notice of its claim to represent employees in an appropriate unit composed of machinists; (2) on or about February 19, 1948, the Respondent discharged

Hewes, then employed at its Richland, Washington operations, and since said date has failed and refused and continues to refuse to reinstate said Hewes to his former or substantially equivalent position for the reason that he joined or assisted the IAM, or engaged in other concerted activities for the purposes of collective bargaining or other mutual aid and protection or for the reason that he did not become a member in good standing of the Engineers; (3) since on or about November 1, 1947, Respondent has solicited its employees to become and remain members of the Engineers; and (4) by the acts described above, the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and in Section 7 of the Amended Act.

On or about October 13, 1948, the Respondent filed its answer, wherein it admitted certain allegations in the complaint, but denied the commission of any unfair labor practices and for its Affirmative Defenses Respondent alleged in substance that it would not effectuate the purposes of the N.L.R.A. as amended, for the Board to assume jurisdiction over Respondent in its said activities; that the work performed by Respondent is known as building trades construction work, which by custom immemorial in the industry, persons and firms desiring said work to be done require the execution of contracts well in advance of the commencement of the work; that prospective contractors, in accordance with said custom, cannot ascertain what the cost of

labor will be nor the availability of labor, without executing a labor contract with the Union able to supply the requisite skilled mechanics in the numbers and at the times required; that Letter Subcontract No. G-133, which formed the basis for the Respondent's undertaking such work, was entered into effective as the July 25, 1947, in contemplation of the Labor Agreement of August 16, 1947, as the Engineers had the only available pool of workmen required for the work to be done under said subcontract; that the Engineers and other labor signatories to the said labor agreement operated only under so-called "closed-shop" conditions; and because of said customs, and the control over all the manpower by the Engineers and other signatory labor Unions, the Respondent was required to execute the union security provisions of said agreement and to comply therewith.

On or about October 15, 1948, the Engineers, filed its answer to the complaint wherein it admitted some of the allegations therein and denied the commission of any unfair labor practices by the Respondent. The Engineers further alleged in substance, that Hewes, upon good and sufficient consideration by contract, agreed to become and remain a member of the Engineers; that relying upon said contract of Hewes, the Engineers did dispatch Hewes to the job with the Respondent; that Hewes did not comply with any of the conditions of the contract and was therefore removed from the job. The Engineers' answer iterates in the main the Affirmative Defenses set out by the Respondent.

Pursuant to notice, a hearing was held at Yakima, Washington, on November 4 and 5, 1948, before Peter F. Ward, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel, the Respondent, Hewes, the IAM, and the Engineers were represented by counsel. All participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues, and at the close of the hearing, the parties were offered an opportunity to argue orally before the undersigned, but such opportunity was waived. The parties were advised that they might file briefs and/or proposed findings of fact and conclusions of law with the undersigned and briefs and proposed findings were filed by Hewes.[2] The Respondent and the Engineers filed briefs only.

At the close of the hearing the undersigned reserved ruling on the Engineers' motion to strike and dismiss as is set forth in Engineers' Exhibits 2-A and 2-B; and also reserved ruling on the motion of counsel for Respondent to strike certain testimony having to do with the "jurisdictional aspects" certain issues involved herein; and the General Counsel's motion to strike certain testimony relating to matters concerning representation proceedings and union security proceedings, and now rules that all said motions to strike be denied.

[2]The undersigned has adopted Hewes' proposed findings, No. 1, in part, and Nos. 3 and 5 in full; and the "Proposed Order" to the extent set forth in the Recommendations, below.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I.

The Business of the Respondent

Guy F. Atkinson Co. and J. A. Jones Construction Co. a joint venture[3] organized for the purpose of accepting the terms of Letter Subcontract No. G-133, an agreement made July 25, 1947, with General Electric Company, as prime contractor, on behalf of the U. S. Atomic Energy Commission for the construction of buildings, facilities, and other items of work in connection with Hanford Engineering Works Project. Respondent's principal office and place of business is located at Richland, Washington, where in the course and conduct of its business it causes and continuously has caused materials consisting of cement, lumber, reinforcing steel, glass, paint, hardware, tools, equipment and other supplies of approximately $20,000,000 in value for the period from July 29, 1947, to April 6, 1948, to be purchased and delivered to it at Richland, Washington. Of such materials, approximately $2,500,000 in value has been purchased, delivered, and transported in interstate commerce from and

[3]A "joint venture" is normally created for the purpose of performing large type Government contracts where single firms or corporations lack sufficient resources to satisfy the Government of their ability to undertake and complete large construction jobs, and are generally dissolved at the end of a given contract.

through States of the United States other than the State of Washington. Approximately $9,500,000 in value of such materials were produced, fabricated and originated from points outside the State of Washington and thereafter were trans-shipped to Respondent from points within the State of Washington.[4] The undersigned finds that the Respondent is engaged in commerce within the meaning of the Act and of the Amended Act.

II.

The Labor Organizations Involved

International Union of Operating Engineers, Local 370, AFL, and International Association of Machinists, are labor organizations within the meaning of Section 2 (5) of the Act and of the Amended Act.

III.

The Unfair Labor Practices

A. The discriminatory discharge of Chester R. Hewes

1. Events antedating the discharge:

Prior to July 25, 1947, the U. S. Atomic Energy

[4]These findings are based upon a stipulation of the parties. Notwithstanding it joined in such stipulation, the Engineers contend that the Respondent's operations as above stipulated do not affect commerce and the Respondent contends in substance, that inasmuch as its operations consist of building construction, the Board should not exercise or assert jurisdiction. Neither contention has merit. Respondent's contention is further discussed below in connection with its defenses.

Commission, herein called the Commission, entered into a contract with General Electric Company, herein called General Electric, as prime contractor, for the construction of buildings, facilities, and other items of work in connection with the Commission's Hanford Engineering Works Project,[5] herein called the Project, located at, and in the vicinity of Richland, Washington.

Under date of July 25, 1947, General Electric, as prime contractor, and the Respondent as subcontractor, pursuant to the terms of "Letter Subcontract No. G-133,"[6] sometimes referred to in the record as the "letter order," entered into an agreement with the Respondent requiring the latter to proceed immediately in preparing to perform such construction work. While it appears that such "letter order" contained no plans or specifications, the Respondent was informed that a part of the work had to do with residential construction to house future employees and the construction of a construction camp area. Such letter order referred

[5]Other than that such Project has to do with security measures undertaken on behalf of the Government of the United States, the record is silent as to the Project's functions.

[6]This is a form used by governmental agencies in emergencies in order that contractors or subcontractors may make preliminary preparations for the procurement of manpower and materials and usually antedates receipt of plans, specifications, or blueprints. Such Letter in its nature is a "stop-gap" agreement which is to be followed by a normal agreement at the earliest possible date.

to the sum of $8,000,000 as an estimate of the cost of construction.

As soon as the Respondent had employed its initial non-manual staff, it met with the Building Trades Department of the American Federation of Labor at Spokane, Washington on August 14, 15, and 16, 1947. On August 16, 1947, the Respondent as Employer and the Engineers and some 14 other affiliates of the Building and Construction Trades Department of the American Federation of Labor, as the Union executed a closed-shop agreement, effective as of August 1, 1947, and to remain in effect until August 1, 1948, and from year to year unless terminated in the manner therein provided.

The contract provided, inter alia:

> Art. III, Sec. 1. This Agreement shall cover all employees who are members of the signatory unions who are performing work within the recognized jurisdiction of such unions as the same is defined by the Building Trades Department of American Federation of Labor, for which employees the Union is recognized as the sole and exclusive bargaining agent.
>
> Art. IV Sec. 2. It is understood and agreed that the Employer shall retain in employment only members in good standing of Union or Those Who have signified their intention of becoming members through the regularly established procedure of the Union.
>
> Sec. 3. While the Union assumes all responsibility for the continued membership of its members and the collection of membership

> dues, it reserves the right to discipline its members and/or those employees who have filed applications to become members; and the Employer agrees to, upon written notice from the Union, release from employment any employees who fail to maintain membership in good standing and/or any employee who defaults in his obligations to the Union. It is understood that the removal of and replacement of such employees shall not interfere with the operations of the job.

It is undisputed that at the date of the execution of the collective bargaining contract on August 16, 1947, the Engineers did not represent a majority of employees of the Respondent in any unit, appropriate or otherwise.[7]

On or about August 28, 1947, the Respondent caused a copy of the August 16, 1947, contract to be posted on its bulletin board at the entrance to its Headquarters and Administration Building, where such copy of the contract remained posted until on or about January 1, 1948.[8]

During the latter part of October, 1947, Chester

[7]In its position in this connection, the Respondent makes no claim that the Engineers represented any employees on August 16, 1947, but contends that the contract was valid and binding on all signatory parties for reasons which are discussed in detail below.

[8]Such posting was caused to be made in an attempt to comply with the provisions of the "rider" made a part of the National Labor Relations Board

R. Hewes, Complainant herein, went to the Respondent's personnel office and applied for a job as a Machinist and asked if he could go to work and work on his Machinist "card." He was informed that it was "a closed job . . . a closed shop," and was referred to the Operating Engineers at Pasco (Washington). Hewes went to Pasco and contacted Ray Clarke, business representative for the Engineers, and asked Clarke if "they" needed any Machinists. Clarke took Hewes into the office and asked him if he were a Machinists, whereupon Hewes presented his Machinist dues book for Clarke's information. Clarke then stated that Hewes would have to turn in his Machinist book and join the Engineers to go on the job. Hewes refused to turn in his book and was told by Clarke that he would be given credit for $60 on his dues amounting to $100 if he turned in his IAM book and would then have to pay but $40 of the remaining amount of dues which would entitle him to membership in the Engineers.

Hewes refused to turn in his book and left Clarke's office. He later returned to Clarke's office and a further discussion was had in connection with his Machinist dues book which he again refused to turn over to Clarke. Hewes then asked if he could not be permitted to work as a Machinist on a

Appropriations Act, 1948. The effect of such posting is discussed and considered below in connection with the contentions of the Respondent and the Engineers to the effect that the contract could not be questioned as to its validity, since it had been posted more than 3 months before the charge was filed herein.

"permit," to this Clarke replied, "I will go you one better. You keep your book and we will charge $40 and you go to work." Thereafter Clarke issued Hewes an Introduction Card assigning him to work with the Respondent as a "Machinist (Precision)."[9]

Hewes went to work on or about November 4, 1947, and was assigned to work in a machine shop in the locale referred to as "3,000 Area." The record discloses that during his employment he was continuously employed performing work ordinarily performed by Machinists, as distinguished from the work performed by Operating Engineers.

2. The discharge—

Under date of February 16, 1948, the Engineers wrote Respondent's labor relations manager as follows:

February 16, 1948

Mr. D. Russell Gochnour, Labor Relations Manager
Guy F. Atkinson Co. and J. A. Jones Construction Co.
Richland, Washington

Dear Mr. Gochnour:

I am requesting the removal of Chester R. Hewes, machine tool operator, from the Hanford Project.

[9]On the original of such introduction card, introduced in evidence, the word "Machinist" had been obliterated. On the duplicate of such card the word "Machinist" still remained. Hewes credibly testified, and the undersigned finds that when the card was turned in to the Respondent, the word "Machinist" was on it.

This man is one of the ring leaders who is trying to sabotage the efforts of the Operating Engineers to supply competent men for your job. This man has absolutely failed in his financial obligation to this Local Union.

The following is a list of other machine tool men who have also failed to meet their obligation and I am requesting that these men be notified at once to pay their obligation to this office not later than this coming Thursday evening, February 19th. Also at the same time, I want them to be notified that if they do not meet their obligation, I will demand their removal from the project.

Claire Abbott	Phillip R. Helwig
John D. Beach	Herbert M. Kinsey
Ben Bishop	Walter A. Mackay
Myron A. Brewer	Archie T. Rollo
O. E. Burns	Ralph E. Rugg
Robert W. Davis	Steve F. Susick
LeRoy A. Dyer	Lyle E. Triplett
Martin R. Griffin	Gordon E. Wood
Charles L. Hall	Gage M. West

This is quite a formidable list; however, my steward reports that he is of the opinion that once these people are notified, they will likely meet their obligations and remain in good standing.

Thanking you for your cooperation and with kind personal regards, I am,

Very truly yours,

/s/ RAY CLARKE,

/t/ RAY CLARKE,

Local 370,

Pasco Branch Office.

The letter above referred to was called to the attension of James J. Molthan employed under the title of Manager of the Contract and Claims Section of Respondent and who also acted as administrative assistant to the general manager. In this connection Molthan testified in part:

> The letter called for us to go and contact various individuals allegedly members of the Operating Engineers, with a view of telling them that if they didn't pay their dues, we were going to discharge them. We were under no contractual obligation to do that on behalf of the various Unions with whom we were dealing at that time.

The above-quoted letter was then withdrawn by the Engineers and a second letter applicable to Hewes only was sent to the Respondent's labor relations manager. The letter reads:

February 16, 1948.

Mr. D. Russell Gochnour, Labor Relations Manager,
Guy F. Atkinson Co. and J. A. Jones Construction Co.,
Richland, Washington.

Dear Mr. Gouchnour:

I am requesting the removal of Chester R. Hewes, machine tool operator, from the Hanford Project. This man has absolutely failed in his financial obligation to this Local Union.

Thanking you for your cooperation and with kind personal regards, I am

Very truly yours,

/s/ RAY CLARKE,
Representative, Local 370,
Pasco, Branch Office.[10]

After the receipt of the foregoing letter Molthan made an investigation and found that Hewes had applied for membership in Local 370 (Engineers); thereafter had defaulted in his financial obligations; and Moulthan testified that he concluded that under the Respondent's contract with the Engineers the Respondent was required to and did discharge Hewes from the pay roll.

On February 18, 1948, Respondent's timekeeper handed Hewes a "lay-off card"; while the card handed to Hewes did not state the reason for the law-off, a photostatic copy of the original of such card in evidence states the reason as "Union request."

The lay-off card contained the following question, "Do you want this workman back again?" after which appeared the word, "Yes" followed by a blank line and under the word yes appeared the word "No" followed by a blank line. Neither alternative was checked.

[10]The record discloses that other individuals named in the first letter sent under date of February 16 were named separately in letters similar to the one sent in connection with Hewes; and like Hewes all were discharged at the request of the Engineers.

Issues; Contentions; Conclusions

The Respondent bases its defense, in substance, on the following points:

(1) That the contract of August 16, 1947, is a typical Building Trades Construction contract of the type over which the Board has not historically asserted or exercised general jurisdiction; and under the circumstances disclosed by the record herein, the Board should decline to exercise its jurisdiction; (2) that the instant proceedings are barred by the "rider" contained in the National Labor Relations Board Appropriation Act, 1948;[11] (3) that pursuant to the terms of the August 16, 1947, contract the Respondent was required to discharge workmen who failed to meet their obligations to Unions signatory to the contract; (4) that inasmuch as the Hanford Works Project was of such vital importance to the National security it was a matter of great urgency that the work be commenced at the earliest possible moment; that at the direction of the Atomic Energy Commission, given on behalf of the Government of the United States, the Respondent undertook the performance of the construction work required by the Project; that in so doing the Respondent found it necessary to solicit manual personnel from the Building and Construction Trades Department of the American Federation of Labor, as the source of the only available labor pool sufficient to fill the job requirements; that in order to receive the cooperation of the American Federation of Labor

[11]Public Law 165, 80th Cong., Chap. 210, 1st Sess.

Building Trades Union, it was absolutely necessary to give such unions the exclusive right to select all such employees; and that in view of all of the foregoing facts the complaint should be dismissed; and (5) that should the foregoing grounds, either jointly or severally, be insufficient to constitute a defense, the Respondent relies upon the representations of its prime contractor, General Electric Company and the U. S. Atomic Energy Commission, that the requirement for immediate performance of the work was urgent and vital and affected with extreme National importance; and since the Respondent has discharged its obligations to the satisfaction of its prime contractor, and if it has thereby violated any of the provisions of the Act or the Act as amended, the good faith of the Respondent constitutes a defense.

As to point (1), while the Respondent does not affirmatively contend that the Board lacks jurisdiction over Building Trades Construction, it implies that the Board has not heretofore asserted such jurisdiction and should, in effect, feel itself estopped to do so in the instant matter. Board decisions have held that the Board has such jurisdiction and has exercised it. In re Brown & Root, Inc. et al.,[12] wherein a group of corporations and firms doing business as a joint venture under the name of Ozark Dam Constructors, who had engaged to build a dam and presumably other facilities as a part of a flood control and electrical power development

[12]77 N.L.R.B. 1136.

project of the War Department, contended that the joint venture was not engaged in commerce within the meaning of the Act, and based its contention on the fact that the Board had in the past refused to exercise jurisdiction in construction cases. In this connection the Board said:

> . . . Aside from the fact that construction of a dam for purposes of flood control and generation of electric power has a greater impact upon commerce than construction of buildings, we have repeatedly stated that our jurisdiction extends over construction projects if their interruption would affect interstate commerce, and that our abstention from exercising our jurisdiction in construction cases was a matter of administrative choice and not legal necessity.

In this case the Board further stated in part:

> Inasmuch as stoppage work on the Bull Shoals Dam would affect shipments of several million dollars' worth of materials into the State of Arkansas from other states, and would delay the production of electricity which will probably be sold in interstate, we find, contrary to the contentions of the Employer, that it is engaged in commerce within the meaning of the National Labor Relations Act and that the purposes of the Act will best be served if we assume jurisdiction in this case. (Citing cases.)

As found in Section I above the Respondent is engaged in interstate commerce within the meaning

of the Act. The Board has and should assume jurisdiction herein.

Point (1) is without merit.

As to point (2),[13] the "rider" in question reads in part as follows:

> No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement, . . . between an employer and a labor organization which represents a majority of his employees in their appropriate bargaining unit, which has been in existence for 3 months or longer without complaint being filed by an employee or employees of such plant: Provided, That, hereafter, notice of such agreement . . . shall have been posted in the plant affected for such period of 3 months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be opened for inspection by any interested persons: . . .

It will be noted that the "rider" (a) presupposes an agreement between an employer and a labor organization which represents a majority of his employees in their appropriate bargaining unit,— and (b) that "notice of such agreement . . . shall have been posted in the plant affected . . . said notice containing information as to the location at an accessible place of such agreement where said

[13]The Engineers also contend that such "rider" is a bar to the instant proceedings.

agreement shall be opened for inspection by interested persons . . . " (Underscoring supplied.)

From the foregoing it would appear necessary to determine first, whether the Engineers represented a majority of the Respondent's employees in an appropriate unit as of the date of the execution of the contract on August 16, 1947,[14] and second, if it did so represent such majority whether notice of such agreement was properly and timely posted.

As to the first point for determination it is clear that on August 16, 1947, when the contract was executed, neither the Engineers or other signatory Unions represented any of the Respondent's employees in an appropriate unit.

In this connection, Molthan, with reference to the negotiation and signing of the August 16, 1947, contract, testified in part:

> We did not ask for any of the Unions that signed this agreement to make a showing that they, in fact, represented persons employed by Atkinson and Jones because actually we had no employees. It is customary in the construc-

[14]The limitation on the use of Board's funds for the fiscal year ending June 30, 1947, did not contain the qualifications that the labor organizations be one "which represents a majority of his [employer's] employees in their appropriate unit" and thus indicates that Congress, by use of such language in the "rider" to the Appropriations Act of 1948, intended to protect only contracts wherein the labor organizations actually represented a majority of an Employer's employees in an appropriate unit at the date of the execution of a collective bargaining agreement.

> tion industry to get your working agreements settled, your wage rates settled through the area agreement, if possible, or set up a special job agreement, as we were required to do at Hanford, and then rely upon the unions signatory to man the job . . .

Assuming arguendo that the facts found next above are insufficient to support a finding that the limitation "rider" of the Board's Appropriations Act of 1948 is not a bar to the proceedings herein, was a sufficient notice of such agreement properly and timely posted?

The only evidence in the record pertaining to posting is the affidavit of Respondent's "Controller" that he caused a mimeographed copy of the August 16, 1947, agreement to be placed upon the bulletin board on or about August 28, 1947 (or some 12 days after the execution of the contract), and that it was his "recollection" that said agreement[15] remain posted on such bulletin board until on or about January 1, 1948.

The "rider" provides inter alia that such notice shall have been posted in the plant affected for said period of 3 months and shall contain "information" as to the "location" at an "accessible place" where the agreement shall be "open for inspection by any interested person." (underscoring supplied)

Did the posting of the mimeographed copy above described comply with the requirements of the

[15]A photostatic copy of the contract in evidence discloses that it was typewritten; consisted of seven pages, and was headed "Agreement" with the Sections typed in singled spaced lines.

"rider" with reference to "notice?" It is clear that no "Notice," as such, was posted. Assuming that the posting of a copy of the contract amounts to a constructive "posting," did such posting of a copy of the contract on a bulletin board constitute the giving of information of an "accessible place" where the agreement was "open for inspection by any interested person"? The record contains no description or dimensions of the bulletin board; does not disclose whether the contract was attached to the bulletin board in a manner making it possible for an interested person to inspect it page by page while it was attached to the board; or whether it was necessary to detach it in order to inspect it. On the basis of the foregoing and the record it is the opinion of the undersigned that the mere "posting" of a copy of the agreement on the bulletin board does not constitute the posting of "notice" as is required by the Appropriations Act of 1948.[16]

In any event it is clear that the agreement, when executed, was not one between "an employer and a labor organization which represents [represented] a majority of his employees in their appropriate unit," as required by the "rider" in question. Said "rider" is not a bar to the instant proceedings. It is so found.[17]

Point (2) is without merit.

[16]See in re Hall Freight Lines, Inc., 65 N.L.R.B. 397.

[17]These findings concerning the "rider" to Board's Appropriations Act of 1948, have been made on the

As to point (3), the Respondent contends that it was compelled to discharge Hewes pursuant to the terms of the August 16, 1947, contract. The record discloses without dispute that at the time of the execution of the contract on August 16, 1947, the Engineers did not represent any employees of the Respondent in an appropriate unit. The Proviso of Section 8 (3) of the Act prior to amendment, insofar as is material herein, reads as follows:

> Provided, That nothing in this act . . . shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.[18] (Underscoring supplied.)

theory that the "rider" is still in force and effect insofar as the instant case is concerned; however, the Appropriations Act of 1948 expired on June 30, 1948, and prior to the issuance of the complaint herein. The National Labor Relations Board Appropriations Act, 1949, did not reenact the "rider" with which we are here concerned. Under similar conditions the Board has held that it is not barred from proceeding to hear cases following expiration of an Appropriations Act. See Kinner Motors, Inc., 57 N.L.R.B. 622.

[18]The Proviso under Section 8 (a) (3) of the Amended Act is to the same effect insofar as it

The Board has long held that an illegal closed-shop contract cannot operate as a defense to discharges made pursuant to the terms of such contract. In the Lennox Shoe Company, Inc., case[19] the Board, after quoting the Proviso to Section 8 (3) of the Act, stated:

> Under this provision and in view of our findings under III, A, above, the contract here in question is clearly invalid. The B. & S. W. U. was not, on the date on which the contract was signed, the free choice of a majority of the respondent's employees and was a labor organization which had been assisted by unfair labor practices. The B. & S. W. U. therefore is within the proviso to Section 8 (3) of the Act quoted above, and the June 9, 1937, contract between it and the respondent is void and of no effect. Of course, this does not mean that the B. & S. W. U. may not hereafter negotiate a new contract with the respondent should it subsequently be certified by the Board as exclusive representative of the respondent's employees.
>
> Since the contract is void and of no effect, it cannot operate as a defense to the discharges of Hill and Coffin.

requires the labor organization to be the representative of the employees is provided in Section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made. (Underscoring supplied.)

[19] 4 N.L.R.B. 272.

Citation of further decisions is deemed unnecessary.

Point (3) is without merit.

As to point (4), the record does indicate that the Hanford Works Project was of vital importance to the National security; that at the direction of the Atomic Energy Commission, and its prime contractor, General Electric Company, the Respondent promptly undertook the performance of the construction work required; and that the Respondent believed that it was necessary and advisable that it solicit manual personnel from the Building and Construction Trades Department of the American Federation of Labor as the source of the only available labor pool sufficient to fill the job requirements; and it is also clear that the Respondent believed that it was necessary to make a closed-shop contract with the American Federation of Labor Building Trades Unions in order to expedite the work.

The Respondent contended in substance and effect, that unless it entered into a closed-shop contract with the signatory Unions to the August 16, 1947, contract, it would have been necessary to spend large sums of money in the procurement of manpower. The Board and the courts have long and consistently held that economic exigency does not excuse violation of the Act. As found in the Star Publishing case,[20] the Court of Appeals for the Ninth Circuit stated:

[20]97 F. 2d 465, 47-5 (C.A. 9).

> The Act prohibits unfair labor practices in all cases. It permits no immunity because an employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by employers.[21]

Point (4) is without merit.

As to point (5), from the record the undersigned is convinced that the Respondent relied upon the representations of its prime contractor, General Electric Company and the Atomic Energy Commission, that it was necessary that the construction work required by the Hanford Engineering Works Project was urgent and vital and effected with extreme National importance; and that the Respondent has discharged its obligations to the satisfaction of its prime contractor; and while the record clearly indicates that the Respondent acted in good faith, such fact does not constitute a defense to the unfair labor practices herein found.

Point (5) is without merit.

Engineers' Contentions

In addition to joining generally in the contentions of the Respondent, counsel for the Engineers contends in substance (1) that the complaint should be dismissed for lack of service on Local 370 of a copy of the charges; and (2) that since Hewes had in effect waived his rights to any remedy under the

[21]See also McQuay-Norris Manufacturing Company v. N.L.R.B., 116 F. 2d 748, 752.

Act or the Amended Act by agreeing to the discharge in a legal contract with the Engineers.

As to Engineers' contention (1) the record discloses that the charge herein was filed February 27, 1948; and was served on the Respondent by registered mail on March 4, 1948. Since the Engineers was not "the person against whom such charge is made," or named a Respondent in the instant proceedings, the provisions of Section 10 (b) of the Act does not require that the Engineers be served with a copy of the charge at any particular time or at all.

As to Engineers' contention (2), the record discloses that on October 27, 1947, Hewes signed an application for membership card in the Engineers whereby he agreed to join the Engineers; pay initiation fees and dues; and designate the Engineers as his exclusive bargaining agency. The Engineers contend, in effect, that Hewes' application for membership became a contract based upon a valid consideration, in which he waived any right to institute proceedings in any court of law or equity against the Engineers; and since he had failed to pay his initiation fee in the Engineers he was properly discharged by the Respondent at the request of the Engineers.

Inasmuch as Hewes, in order to be employed by the Respondent, was compelled to make application in the Engineers as the result of an illegal contract executed between the Respondent, the Engineers, and other unions the Engineers' contention is wholly without merit and is so found.

Conclusions

From the foregoing and the record it appears and the undersigned finds that the Respondent discharged Chester R. Hewes on February 19, 1948, upon the demand of the Engineers pursuant to the terms of an invalid contract and thereby discriminated in regard to his hire and tenure of employment thereby discouraging membership in the IAM and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and Section 7 of the Amended Act, in violation of Section 8 (1) of the Act and Section 8 (a) (1) and (3) of the Amended Act.

B. Interference, restraint, and coercion; the alleged violation of Section 8 (2) of the Act and Section 8 (a) (2) of the Amended Act

The complaint, in substance, alleges that in violation of Section 8 (2) of the Act, reenacted as Section 8 (a) (2) in the Amended Act, the Respondent (1) entered into the closed-shop agreement above described which required its employees to become and remain members of the Engineers; (2) that at the time of the execution of said contract the Engineers did not represent a majority of the Respondent's employees at its Richland operations in an appropriate unit or in any unit that was appropriate for collective bargaining; (3) that said contract was executed and made effective by Respondent at a time when the IAM had given to

Respondent actual notice of its claim to represent employees in an appropriate unit composed of employees who customarily and regularly performed work of Machinists; (4) that notwithstanding that during the time Hewes was employed by the Respondent he performed work regularly performed by Machinists and not type of work performed by Engineers or coming within the terms of such contract, Hewes was, pursuant to demand of the Engineers made on February 16, 1948, discharged on or about February 19, 1948; and (5) that since on or about November 1, 1947, Respondent has solicited its employees to become and remain members of the Engineers. The undersigned has found in Section III A, above, that the Respondent entered into a closed-shop contract with the Engineers, at a time when the Engineers did not represent any of Respondent's employees in any unit; that such contract required the employees to become and remain members of the Engineers; and that it discharged Hewes (and other employees not party to these proceedings) because he had failed to "remain in good standing" with the Engineers.

With reference to allegation that when the Respondent executed the closed-shop contract with the Engineers, the IAM had given the Respondent "actual notice of its claim" as representative of employees in an appropriate unit of Machinists, the record discloses that under date of August 11, 1947, James A. Duncan as respresentative of IAM wrote Ray H. Northcutt, vice president of Guy F. Atkinson Company, inquiring as to what the policy

of the latter company was to be in connection with the hiring of employees in the Machinists' category on the "Richland" and another project. Under date of September 15, 1947, Northcutt wrote Duncan explaining that the contract of August 16, 1947, had been negotiated with AFL Building Trades Unions, and stated inter alia that it was his understanding "that unions not so affiliated might execute separate agreements for this (Hanford) Project."

Subsequently the Respondent requested IAM to submit copy of its "Schedule A," which was delivered along with a copy of "Machinists' Standard Agreement." Insofar as the record discloses, the IAM contended that it represented the Machinists in the Buildings Trade; asked to be considered; and made no claim as representative of any of the Respondent's employees.[22] With reference to the allegation that Respondent "solicited" its employees to become and remain members of the Engineers, the record contains no evidence of "soliciting." The record does disclose, however, that when Hewes asked for employment as a "Machinist," he was told that it was "a closed job * * * a closed shop," and that he would have to see the Engineers. This he did and subsequently

[22]Counsel for Respondent, in his brief states:

> Inasmuch as the International Association of Machinists was not an affiliate of American Federation of Labor the cooperation of the American Federation of Labor Building Trades Department would not have been available if respondent had used International Association of Machinists on the job.

he (along with other employees) was discharged at the instigation of the Engineers.[23]

It has been found above that at the date of the execution of the August 16, 1947, contract the Engineers did not represent a majority of the employees of the Respondent in an appropriate unit; that following the execution of such contract as aforesaid, the Respondent required employees to become and remain members of the Engineers; and on or about February 18, 1948, the Respondent, at the request of the Engineers, discharged Chester R. Hewes and some 18 other employees (not parties to these proceedings) for non-payment of dues to the Engineers.

From the above and the record the undersigned is of the opinion that the Respondent's conduct herein falls short of domination or support within the meaning of Section 8 (2) of the Act and Section 8 (a) (2) of the Amended Act and that the Respondent did not dominate the Engineers or otherwise engage in conduct violative of that por-

[23]In its first request, made on February 16, 1947, that Hewes et al. be discharged, the Engineers, referring to Hewes, stated: "This man is one of the ringleaders who is trying to sabotage the efforts of the Operating Engineers to supply competent men for your job." The undisputed testimony shows that the Respondent considered Hewes a competent and satisfactory worker. From all of which it may be inferred that Hewes was active in seeking members for the IAM, and that such activity was one of the reasons which caused the Engineers to seek his discharge.

tion of the Act or the Amended Act.[24] The undersigned finds, however, that, by the signing of the closed-shop contract as aforesaid; by requiring its employees to become and remain members of the Engineers, thereby enhancing the prestige of the Engineers; and by the discharge of Hewes and other employees on February 18, 1948, thereby enforcing its illegal recognition of the Engineers, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and Section 7 of the Amended Act, and thereby violated Section 8 (1) of the Act and Section 8 (a) (1) of the Amended Act.

In view of the foregoing, which discloses illegal assistance, it will be recommended that the Respondent withdraw and withhold recognition from the Engineers as representative of its employees and cease giving effect to its contract with the Engineers in the manner set forth in the Section entitled "The remedy" below.

IV.

The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial

[24]See In re Shenandoah-Dives Mining Company, 56 N.L.R.B. 715; Hershey Metal Products Company, 76 N.L.R.B. 695.

relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

The remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The undersigned has found that the Respondent discriminated in regard to the hire and tenure of employment of Chester R. Hewes. It will be recommended that the Respondent offer to said Hewes immediate and full reinstatement to his former or substantially equivalent position[25] without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him of a sum of money equal to that which he would have normally earned as wages from the date of his discharge to

[25]In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible and if such position is no longer in existence then to a substantially equivalent position." See Matter of The Chase National Bank of The New York City, San Juan, Puerto Rico Branch, 65 N.L.R.B. 827.

the date of the Respondent's offer of reinstatement, less his net earnings[26] during such period.

The undersigned has further found that the Respondent did not dominate the Engineers' violation of Section 8 (2) of the Act or Section 8 (a) (2) of the Amended Act. It has been found, however, that the Respondent illegally recognized the Engineers and thereafter discharged certain employees at the request of the Engineers and thereby enhanced the prestige of the Engineers.

In order to remove the effects of such illegal support to the Engineers and in order to insure to the employees full and free exercise of the rights guaranteed in Section 7 of the Act and of the Amended Act, it will be recommended that the Respondent withdraw and withhold recognition of the Engineers as the representative of any of its employees for the purpose of collective bargaining until such time as the Engineers may be certified as their representative by the Board. It will be further recommended that the Respondent cease giving effect to the above-described contract or to

[26]By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for this unlawful discrimination and the consequent necessity of his seeking employment elsewhere. Matter of Crossett Lumber Company, 8 N.L.R.B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered earnings. Republic Steel Corporation v. N.L.R.B., 311 U.S. 7.

any other contract made with the Engineers prior to certification, without prejudice, however, to the assertion by the employees of any legal rights acquired thereunder. Nothing herein, however, shall be taken to require the Respondent to vary those wage, hour, and other substantive features of its relations with the employees themselves which the Respondent may have established in conformity with the contract as extended, renewed, modified, supplemented, or superseded.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Union of Operating Engineers, Local 370, AFL, and International Association of Machinists, are labor organizations within the meaning of Section 2 (5) of the Act and of the Amended Act.

2. By discriminating in regard to the hire and tenure of employment of Chester R. Hewes, thereby discouraging membership in International Association of Machinists, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act, and Section 8 (a) (1) and (3) of the Amended Act.

3. By interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor prac-

tices within the meaning of Section 8 (1) of the Act and Section 8 (a) (1) of the Amended Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of both the Act and of the Amended Act.

5. The Respondent has not violated Section 8 (2) of the Act or Section 8 (a) (2) of the Amended Act by dominating the Engineers.

Recommendations

Upon the above findings of fact and conclusions of law, and upon the entire record in the case, and pursuant to Section 10 (c) of the Act and Section 10 (c) of the Amended Act, the undersigned recommends that Guy F. Atkinson Co., a corporation, J. A. Jones Construction Co., a corporation, d/b/a Guy F. Atkinson Co. and J. A. Jones Construction Co., of Richland, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, by discharging and refusing to reinstate any of its employees or in any manner discriminating in regard to the hire and tenure of employment or any term or condition of employment;

(b) Interfering with the administration of International Union of Operating Engineers, Local 370, AFL, or with the formation or administration of any other labor organization, and for contribu-

ting support to the above-named labor organization, or to any other organization;

(c) Recognizing International Union of Operating Engineers, Local 370, AFL, or any successor thereof, as the representative of any of its employees for the purposes of collective bargaining with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until such organization shall have been certified by the Board as the representative of the employees;

(d) Giving effect to or performing its contract dated as of August 16, 1947, with International Union of Operating Engineers, Local 370, AFL, relating to rates of pay, wages, hours of employment, and other conditions of employment, or any extension, renewal, modification, or supplement thereof, or any superseding contract with the said Engineers or any successor thereof, without prejudice, however, to the assertion by the employees of any legal right thereby acquired;

(e) Discouraging membership in International Association of Machinists, or any other labor organization of its employees, or encouraging membership in International Union of Operating Engineers, Local 370, AFL, or any other labor organization of its employees by discharging and refusing to reinstate any of its employees, or in any other manner discriminating in regard to the hire or tenure of employment or other term or condition of employment;

(f) In any other manner interfering with, re-

straining, or coercing its employees in the exercise of the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act and in Section 7 of the Amended Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act and of the Amended Act:

(a) Withdraw and withhold recognition from International Union of Operating Engineers, Local 370, AFL, or any successor thereof, as the representative of any of its employees for the purpose of collective bargaining with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said Engineers or its successor shall have been certified by the Board as the representative of the employees;

(b) Offer to Chester R. Hewes immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole in the manner set forth in Section V, entitled "The remedy";

(c) Post at its plant in Richland, Washington, copies of the notice attached hereto and marked Appendix. Copies of said notice to be furnished by the Regional Director for the Nineteenth Region, after being signed by representatives of the

Respondent, shall be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to the employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notice is not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region in writing, within twenty (20) days from the date of the receipt of this Intermediate Report, what steps the Respondent has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the receipt of this Intermediate Report, the Respondent notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the actions of the aforesaid.

It is further recommended that the complaint be dismissed insofar as it alleges that the Respondent violated Section 8 (2) of the Act and Section 8 (a) (2) of the Amended Act.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board —Series 5, as amended August 18, 1948, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, filed with the Board, Washington 25, D. C., an original and six copies of a state-

ment in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 12th day of May, 1949.

/s/ PETER F. WARD,
Trial Examiner.

Appendix

Notice to All Employees
Pursuant to

The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, and said Act as amended, we hereby notify our employees that:

We Will Not interfere with the administration of International Union of Operating Engineers, Local 370, AFL, or with the formation or administration of any other labor organization, or contribute support to the above-named labor organization or any other labor organization.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

We Will Withdraw and Withhold recognition of International Union of Operating Engineers, Local 370, AFL, as representative of our employees for the purpose of collective bargaining until such time as the said Engineers may be certified as their representative by the Board and we will not give effect to or perform the contract now in existence with said organizations pending such contingency.

We Will Offer to Chester R. Hewes immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges, previously enjoyed, and make him whole for any loss of pay as a result of the discrimination in the manner directed by the Trial Examiner in his Intermediate Report under the Section entitled "The remedy," a copy of which Intermediate Report is on file at the office of the undersigned and may be inspected by interested persons during office hours.

All our employees are free to become or remain members of International Association of Machinists or any other labor organization.

Dated.....

GUY F. ATKINSON CO. and
J. A. JONES CONSTRUCTION CO.
(Employer.)

By.....
(Representative.) (Title.)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Filed in informal file.

Before the National Labor Relations Board

[Title of Cause.]

RESPONDENT EMPLOYER'S MOTION FOR RECONSIDERATION OF DECISION AND ORDER

Guy F. Atkinson Company, a corporation, and J. A. Jones Construction Co., a corporation, doing business as Guy F. Atkinson Company and J. A. Jones Construction Co., a joint venture, the respondent employer in the above proceeding, has been served with a copy of the Decision and Order issued in the above case under date of June 9, 1950.

Respondent employer, having considered the Decision and Order and the grounds stated therein, hereby files with the National Labor Relations Board this Motion for Reconsideration for the purpose of requesting that the Board, upon such reasonable notice as it may determine, reconsider said Decision and Order and thereupon modify and set aside the same in whole or in part, thereupon finding that the discharge of complainant Chester R.

Hewes on Febraury 19, 1948, was not a violation of Section 8 (a) (3) and 8 (a) (1) of the Labor Management Relations Act of 1947.

The Specific grounds upon which this Motion for Reconsideration is made are stated hereinafter.

I.

Nature of the Findings of the Board as Stated in the Decision and Order.

The Board's decision, stripped of surplusage, makes in sequence about fourteen separate findings. For convenience in the presentation of this Motion, and so that Respondent's understanding of the Decision may be made clear to all who are interested and concerned, we state that the basic findings are the following:

(1) The operations of the Respondent affect commerce.

(2) The Board did not choose to exercise jurisdiction over the construction industry under the original Act.

(3) The Board's abstention from exercising jurisdiction over the construction industry under the original Act was an administrative choice rather than a legal necessity.

(4) Since 1947, under the amended Act, the Board has asserted jurisdiction over substantial construction projects, including this one.

(5) The policies of the Act will be effectuated by the exercise of jurisdiction in this instance.

(6) Because of Section 102 of the amended Act, the availability of the closed-shop contract of August 16, 1947, as a substantive defense must be determined under the original Act.

(7) In virtually all categories, including that of operating engineers, the work force employed at the time the contract was signed was not at all representative of that shortly to be employed.

(8) Without attempting to determine the scope of an appropriate unit, the (Operating Engineers) union could not have been, as required by Section 8(3) of the original Act, the representative of the employees in an appropriate unit.

(9) Congress made no exception to Section 8(3) of the original Act based upon custom in any industry, and the Board cannot give effect to a custom contrary to the statute.

(10) The fact that the Contract was executed in a manner customary in the construction industry is no justification.

(11) The fact that the Respondent may have acted in good faith or in the presence of a national emergency is not a sufficient legal defense.

(12) The Respondent could not have been charged with refusal to bargain, since the (Operating Engineers) Union was not the representative of the employees.

(13) The contract relied on as a defense to

the discharge of complainant Hewes is not within the protection of the proviso to Section 8(3) of the original Act.

(14) The discharge of complainant Hewes violated Section 8(a) (3) and 8(a) (1) of the amended Act.

II.

The Decision Fails to Consider or Answer the One Basic Issue That the Board Members Themselves Stressed at the Oral Argument

Respondent submits that a reading of the Decision will disclose that it is devoid of any discussion of the very basic issue which the Board members themselves posed at the outset of the oral argument.

This controlling issue is not decided against Respondent and in favor of complainant Hewes. It is not decided at all! It is not even discussed! The Decision would lead one to believe that the Board members did not understand it was presented, or that this case depended upon an answer to it.

A. The Way the Board Members Posed the Basic Issue

At the oral argument on the morning of December 19, 1949, Board Chairman Paul M. Herzog participated actively in clearing away the confusing collateral issues, and focussing sharply upon the controlling and basic issue upon which this proceeding was to be finally decided.

During the early stages of the opening statement by the representative of Respondent, who made the first appearance, the Chairman asked pointedly:

"Chairman Herzog: I do not know how other counsel are going to feel about that. I am not stating what my own final position is, but——

"Let me ask you this: If this was a Wagner Act issue, although coming up in 1949 before us, certain principles enunciated by the old Board under the Wagner Act would be sufficient to protect your client against liability?

"Mr. Johnson: That is the way we view that."

(Tr. p. 20, emphasis added).

After representatives of all of the parties had concluded their opening statements, Board Member Abe Murdock again stated this fundamental issue with clarity and emphasis, directing the final minutes of the rebuttal argument toward an answer to it. This was the colloquy:

"Mr. Murdock: Under Section 102 of the Taft-Hartley Act, and due to the fact that under the Wagner Act this Board never asserted jurisdiction over the construction industry, does that fact distinguish this case?

"Mr. Johnson: Yes, I think it does. I think you have put your finger right on the essential point.

"Mr. Murdock: It seems to me that one of the very important aspects of the case is that the Board never asserted jurisdiction over the construction industry under the Wagner Act and then, if we come to the conclusion that

this contract was entered into subject to the Wagner Act, what then?

"Mr. Johnson: That is the very point, Senator."

(Tr. p. 96, emphasis added).

B. The Nature of the Basic and Controlling Issue.

Because of those questions and the discussion that followed them, Respondent was confident that the Board members and all of the parties who were represented at the hearing understood that one clear-cut issue would control the ultimate determination of the legality of the closed-shop contract of August 16, 1947.

That basic issue seemed to be presented as follows:

(1) Assuming that the legality of the contract must be determined under the original Wagner Act; and

(2) Assuming that under the original Wagner Act the Board did not assert jurisdiction over the construction industry;

Then, This Is the Issue:

Is the legality of the contract to be determined by the provisions of the original Wagner Act as it was interpreted up to August 23, 1947, by the Board then administering it, on the basis of principles of administrative interpretation then enunciated and carried out, even though the determination in this proceeding is made at a later date when, concededly, a new and different policy of administrative interpretation is being applied to current problems under the amended Labor Management Relations Act?

Stated another way, the issue is:

Does the pre-August 23, 1947, Wagner Act era administrative interpretation control?

Respondent's prompt answer to the Board members' questions was that the determination of the contract's legality had to be based upon both the original Wagner Act language and the Wagner Act administrative interpertation.

C. How the Basic Issue was Discussed at the Oral Argument.

In order that the discussion of the basic issue at the December 19th oral argument may be clear, Respondent refers to these portions of the Transcript:

> "Chairman Herzog: As I read the Act and note that it is only a one-year contract and that it was executed five days before the effective date of the Taft-Hartley Act on August 22nd, 1947, Section 102 of the present statute seems to me to govern.
>
> "Mr. Johnson: That is right.
>
> "Chairman Herzog: I didn't see any particular reference to that in the Intermediate Report. I wanted to ask all counsel to help me a little on that point.
>
> "It may well be that it does not make very much difference but yet it seems to me that in the Atkinson and Jones Case, as distinguished from some of the matters that we will be taking up this afternoon, the real issue is the legality

of that contract under the Wagner Act. Am I wrong?

"Mr. Johnson: I take that position.

"I agree with you that it does not appear to be covered extensively, shall I say, instead of adequately in the intermediate report, but I think that is of major importance and I have that noted as one of my concluding remarks that as I view it, this contract is to be construed and its legality determined by Section 102 and, of course, we are thrown back to Wagner Act rulings and as I see it we are able to avail ourselves and the Board is able to determine the case not only on the statute as it then existed but on the statute as interpreted at that time by the Board.

"In that situation, we take the position that clearly what was done here would not have been a violation of the Wagner Act and therefore under Section 102 it is not a violation to have done the same thing by agreement entered into prior to August 23, 1947 . . .

"Chairman Herzog: I do not know how other counsel are going to feel about that. I am not stating what my own final position is, but

"Let me ask you this: If this was a Wagner Act issue, although coming up in 1949 before us, certain principles enunciated by the old Board under the Wagner Act would be sufficient to protect your client against liability?

"Mr. Johnson: That is the way we view that.

"Chairman Herzog: Now what is it you have in mind on that point?

"Mr. Johnson: I have this in mind, Mr. Chairman: That by, I will say almost unanimous Board decision and policy during the Wagner Act era, this Board held administratively that the Act did not apply to the building and construction industry and that no certification was necessary in order for a contractor and union, without fear of unfair practice charges to negotiate a completely closed shop union.

"Chairman Herzog: So you would apply the old Board's Doctrine on the exercise of jurisdiction under the Wagner Act to this contract?

"Mr. Johnson: I would."

(Tr. pp. 18-19-20-21 emphasis added.)

D. The Manner in Which the Decision Disposes of the Controlling Issue

The Decision disposes of the vital issue without determining it, or even recognizing it.

One short paragraph sets forth the full discussion on the question of the assertion of jurisdiction over the construction industry. This is that paragraph in its entirety:

"Although the briefs of the Respondent and the Operating Engineers point to the non-assertion of jurisdiction over construction projects under the original Act, such abstention was an administrative choice rather than a legal necessity,[2] and does not estop our present exercise

of jurisdiction.[3] Indeed, since 1947, under the amended Act, we have asserted jurisdiction over substantial construction projects, including this very project."

It will be seen that this part of the Decision states three findings, as follows:

(1) Right up to August 23, 1947, the Wagner Act Board abstained from exercising jurisdiction over the construction industry under the original Wagner Act;

(2) The Wagner Act Board's abstention was an administrative choice rather than a legal necessity;

(3) Since August 23, 1947, the present Board has asserted jurisdiction over substantial construction projects under the amended Act.

Respondent has no quarrel with any of those findings. The portions of the Transcript that we have set out under II, C above demonstrates our agreement with the first two such findings. At another point in the oral argument Respondent's counsel was asked his position, and that of Respondent, on the third such finding. Again, our answer was identical with the Board's finding. This was the discussion:

"Mr. Houston: Do you have a position as to whether or not the Board has authority to exercise discretion and whether or not they ought to assert jurisdiction in the construction industry?

"Mr. Johnson: I can answer that for Atkinson-Jones.

"Mr. Houston: Yes.

"Mr. Johnson: Yes, sir, we have considered that from the legal situation since the effective date and I will say before the effective date of the Taft-Hartley Act and it has been our considered opinion, based not only upon my legal views but others,' that because of the nature of the work that our people do, month in and month out, in all of the various states and throughout the world that, unquestionably, our type of work comes within the Act." (Tr. pp. 102-103, emphasis added.)

III.

The Board Should Reconsider the Case and Make a Finding on the Basic Issue

Respondent's protest on this Motion is against the failure of the Board to make any finding at all on the controlling issue.

Specifically, we call to the Board's attention that it should have made a separate and additional finding which should have been inserted between the second and third findings discussed in II, D above. That missing finding, which we would suggest should be supplied upon the reconsideration requested herein, would be substantially as follows:

"The administrative policy or choice, of abstaining from asserting jurisdiction over the

construction industry, will continue to be recognized and applied by us in cases which under Section 102, must be determined on the basis of the original Act."

With such a finding added, and the present Decision presents no reason why it should not be, it would then be necessary for the Board to find that:

"The closed-shop contract of August 16, 1947, between the Respondent and the Operating Engineers is a valid defense to the discharge of Chester R. Hewes on February 19, 1948."

That finding should be substituted, upon reconsideration, for the present finding:

"2. Like the Trial Examiner, we must find that the closed-shop contract of August 16, 1947, between the Respondent and the Operating Engineers[5] is not a valid defense to the discharge of Chester R. Hewes[6] on February 19, 1948."

The reconsidered Decision should end there, adding only the necessary finding that no unfair labor practice was committed. This would make it possible to eliminate from the present Decision the ill-considered and confusing discussion as to whether:

"the contracting union was the statutory representative of the employees in an appropriate unit when the agreement was made."

Respondent suggests to the Board with assurance that reconsideration of this proceeding, and a termination of the new and reconsidered decision at the

place and in the manner suggested in this Motion would be a major contribution toward ending the unrest, confusion and concern now prevailing throughout the entire construction industry because of the Board's complete failure to grasp the significance of the vital issue, or its unwillingness to determine it.

IV.

The Wagner Act Board's Administrative Choice Not to Assert Jurisdiction Over the Construction Industry Was Based on Compelling Reasons and Should Continue To Be Applied to Cases Decided Under the Original Act

The basis of the Board's policy in abstaining from asserting jurisdiction over the construction industry under the original Act was discussed very recently by Board Member Reynolds in his dissenting opinion in the Denver Building Trades Council-Churches decision (June 22, 1950, 90 NLRB No. 66). He stated:

> "Before the amendments to the Act, the Board did not customarily exercise jurisdiction over operations in the building and construction industry because it did not believe that it would effectuate the policies of the Act to assert jurisdiction over an industry which it viewed as relatively local in character."

Cited in support of that statement were the familiar construction industry decisions of the Wagner Act era:

> Johns-Manville Corporation and Johns-Manville Sales Corporation, 61 NLRB 1;
>
> Brown and Root, Inc., et al., 51 NLRB 820.

It is submitted that there were other considered and compelling reasons, other than any possible inertia on the part of the Board, that contributed to the administrative abstention from asserting jurisdiction over the construction industry.

There were, and still are, three major factors that must have motivated the Board in reaching the most satisfactory solution to the very practical problems presented by the construction industry. They were:

(a) The Wagner Act was primarily a Bill of Rights for labor, and in the construction industry the unions had demonstrated their ability to organize the crafts involved and to maintain satisfactory working conditions.

(b) No assurance of continuity of work for any single employer could be counted upon, because construction work was primarily obtained through competitive bids. Very seldom were any single group of workers employed throughout a project (each craft coming and going as its type of work was required), and in most areas of the country weather conditions cut the construction season to seven to eight months rather than a full twelve months' period.

The concept of a "pool" of employees represented by their local and international unions serving all of the construction employers in the area had not been then advanced, and under the situation as it existed at that time, election

procedures involving a single employer were not practical.

(c) Withholding recognition from the regularly constituted craft unions until such time as a given "unit" was substantially manned would mean, in practice, that each employer would be free to impose such working conditions as he could get individual men to work under until the job reached substantial proportions. Then on many jobs before normal election procedures could be accomplished and certification obtained, the bulk of the work would be completed. This would work a particular hardship on the basic crafts for whom the job pattern would be set early in the construction projects. Their business agents would continually have the uphill job of negotiating changes in conditions under which work was actually going on.

Conversely, the employer would be subject to work stoppages at the whim of individual members of those crafts who normally would have only one or two men on the job and who, in each instance, would arrive on the job without any prior contract. For example, if the cement finishing is stopped at any given stage the entire job is soon held up accordingly. If these men were able to make new demands daily (just when the concrete was being poured), the employer would be in the position of having to accede or stop the job. He would still be unable to make any concession granted

by him the consideration for a firm contract that would cover the balance of the project.

As a practical method, the use of area type bargaining and pre-job conferences takes out of the bidding a "labor contingency" that every contractor must otherwise add to his bid as increased cost. This practice reduces the total cost of construction to the owner or agency for whom it is done. The rule now promulgated by the Board needlessly adds this contingency in the construction estimate and creates an added cost at a time when every effort should be made to maintain stability and reduce building costs.

Respondent submits that the administrative policy of abstention was based on sound, well-considered reasons. The Board, although now asserting jurisdiction over construction under the amended Act, should even now continue to apply to cases that must be decided under the original act both the statutory language and the administrative interpretation that the thinking, the atmosphere and the practical considerations of the Wagner Act era compelled.

Respondent's counsel stated our position at the oral argument, when he said:

"Mr. Johnson: . . . While I was not a member of the Board at the time and did not have too intimate pipe lines into their thinking, I would gather that it was issues of that type: the urgent nature of the construction; the problems which are involved in organizing and

recruiting a job; and these jurisdictional problems they were concerned with. There was nothing, I gathered, they were more anxious to get rid of than these jurisdictional disputes, because there was no way under the Wagner Act of clearing them up, as the Chairman suggested. How could we have lawfully done it? We wanted to do it not only legally but morally right. What could we have done? There were no facilities available under the Wagner Act . . .

"Considering the general practical considerations which the Wagner Act Board knew about, which caused them to rule administratively that they would not take jurisdiction of the industry, it seems to me that in fairness, that policy must be recognized and followed in your consideration of this case."

(Tr. pp. 98-99, emphasis added.)

As has been made clear, Respondent contends that recognizing and applying the Wagner Act administrative interpretation today or next month to cases required to be decided under the original Act does not conflict with or estop the Board's policy of now asserting jurisdiction under the amended Act. There are simply two different sets of rules applying contemporaneously to two different factual conditions.

V.

The Board Failed to Consider as a Defense the Area-Wide Multiple Employer Contract Between the Spokane Chapter of the Associated

General Contractors of America, Inc. and Operating Engineers Union, Local No. 370

The Decision considers only the contract of August 16, 1947. There is no reference to or consideration of the contract entered into on February 28, 1947, between the Spokane Chapter of The Associated General Contractors of America, Inc. and the International Union of Operating Engineers, Local 370. This agreement was referred to at the oral argument by Respondent's counsel:

> "Mr. Johnson: The next point that we want to make to you, Mr. Chairman, is that at the time that the Atkinson-Jones Company held this so-called pre-job conference on August 14 to 16 of 1947, which is referred to extensively in the record and which I am not going to bore you with, there was then in existence in the area involved an agreement between the Operating Engineers Union, which is here involved, and the Spokane chapter of the Associated General Contractors, dated February 28, 1947, covering as we view it all of the work or type of work here involved and that in the case of this contract which was executed both prior to the enactment date and effective date of the Amended Act, that the provision was a closed shop contract so that there was available to the contractors when they came into the area an available multiple employer area-wide contract with this individual union providing for a closed shop.
>
> "I do desire to call your attention to the

important fact that this area-wide agreement with the Spokane Chapter of the Associated General Contractors was limited to operating engineers and teamsters.

"Obviously it is not adequate to cover the craft breakdown which is indicated by the exhibits just introduced."

(Tr. pp. 16-17, emphasis added.)

This contract covered the territory involved; it covered the type of work involved; it covered the Union involved; it covered the sponsoring joint venture of Respondent (Guy F. Atkinson Company became affiliated with the Spokane Chapter, and bound by the terms of the agreement on July 1, 1947).

The area-wide multiple-employer contract was signed before either the enactment date or the effective date of the amended Act. It contained a closed-shop clause, and was to be effective until January 1, 1949.

Respondent points to the fact that very recently the Board has recognized that in representation cases a construction employers' association and its members must be regarded as a single enterprise. In General Contracting Employers Association (June 22, 1950), 90 NLRB No. 78, the Board stated:

"Consistent with our well-established policy in representation cases, we find that in passing upon the jurisdictional issue herein, the Association and its members must be regarded as a single enterprise. That the totality of the operations, in volume and character, of all members of the Association has a substantial effect

> on interstate commerce is apparent. The fact that we might not assert jurisdiction as to each member if before the Board individually or that this proceeding does not directly involve all its members is not here material, because the alleged unfair labor practices are attributed to the Association itself and are the result of the application of a common labor policy by the Association on behalf of its members, including those involved herein."

Respondent raises this point of defense as an alternative to its contention that the Wagner Act administrative policy should be applied in this case. That contention is sound, but even if the Board should reject it and cling to its finding in the present Decision, this point would be a separate defense.

The point to be emphasized is that if the members of the multiple-employer unit are to be recognized as a single unit, then recognition of the appropriate unit should be based upon the pool of employees of all of the individual employers making up the unit, and upon all of the work being performed by all of the individual employers. Applying that proper method of determining the scope of an appropriate unit, the Spokane A.G.C. Chapter clearly was entitled to negotiate with the Operating Engineers Union, Local 370. Respondent, as one of the individual employers for whose benefit the contract was negotiated, was entitled to all of the benefits and protective advantages of the multiple-employer plan of negotiation.

The Board should grant the motion to reconsider

its Decision and Order, and render a new Decision embodying a finding recognizing the multiple-employer contract. It should also find the closed-shop provision of that agreement to be a valid defense to the charge of complainant.

VI.

Conclusion

For the reasons, and upon the grounds stated above, Respondent moves that the Board reconsider its Decision and Order, and thereupon modify and set them aside as herein requested.

Dated: July 3, 1950.

/s/ GARDINER JOHNSON,
Attorney for Respondent-Employer.

Received July 7, 1950.

Filed in formal file.

Before the National Labor Relations Board

[Title of Cause.]

PETITION OF ENGINEERS LOCAL UNION 370 FOR RECONSIDERATION OF DECISION AND ORDER AND FOR REOPENING THE RECORD

Engineers Union Local 370 herein petitions the National Labor Relations Board to reconsider its Decision in the instant case and to reopen the

Record for the inclusion of certain later developed pertinent material as follows:

I.

The Requirement for Posting of Notice

The National Labor Relations Board has ordered that a "Notice to All Employees" be posted by the respondent Atkinson-Jones, which notice is titled Appendix A and attached to the Board's Order.

The National Labor Relations Board's Decision in the instant case was based upon a construction of the collective bargaining agreement of August 16, 1947, (General Counsel Exhibit No. 5), by the terms of which agreement the respondent, Atkinson-Jones, recognized Local 370, International Union of Operating Engineers, as the collective bargaining agent for certain of its employees doing work within the jurisdiction of that organization. A subsequent agreement effective August 10, 1948, (Hewes Exhibit No. 1), was later entered into between the respondent and the several building trades unions affiliated with the American Federation of Labor and covering respondent's work at Hanford Works, Richland, Washington. Since the effective date of this agreement, August 10, 1948, there has been no bargaining recognition by the respondent, Atkinson-Jones, of Local 370, International Union of Operating Engineers, as the sole and exclusive bargaining agent for any of Atkinson-Jones employees, save only to the extent that the reservation of recognition embodied on Page 13, under the Article

entitled V, "Recognition" of the agreement of August 10, 1948, was resolved by the Board's certification of the Engineers in Case No. 19-RC-138. In fact, however, even prior to August 10, 1948, for all practical purposes collective bargaining between the respondent Atkinson-Jones and Local 370, International Union of Operating Engineers, had ceased by reason of the filing of the charges herein.

In recognition of the obligations devolving upon the parties by reason of the provisions of the amended Act, the August 10, 1948, agreement may be seen as an "Open Shop" contract pending compliance by the Engineers Local 370 and the several other signatory unions with the election requirements of the Act.

In support of the foregoing the following testimony elicited at the hearing held at Yakima, Washington, on November 4 and 5, 1948, is pertinent. (Pages 69 and 70 of the Transcript).

> Question—Mr. Gill: "I see. In other words, the company has not made any decision up to this date that they would not hire back Mr. Hewes?"
>
> Answer—Mr. Hibberd. "That is right."
>
> Question—"At his former job, or a similar job, if the job were available and he applied for it?"
>
> Answer—"Yes."
>
> Question—"Do your records show any application by Mr. Hewes for his former job, or a similar job, after February 18, 1947?"
>
> Answer—"No, we have no application blank in the records."

Question—"Are there any records of the company to which you have had access, or that come within your knowledge, which show that respondent would not hire back Mr. Hewes if he applied for his job and the job was available, or a similar job, subsequent to August 10, 1948?"

Answer—"If Mr. Hewes applied for rehire, the decision in the personnel office as to eligibility would be based on the records of this original card, of which this is a photostat."

(The above testimony was presented in the presence of Chester Hewes, the charging party, National Labor Relations Board Counsel, Patrick J. Walker, and Counsel E. J. Egan for Chester Hewes.)

Subsequent to August 10, 1948, therefore, Hewes was eligible for employment by Atkinson-Jones without any requirement for union clearance or membership within Local 370, International Union of Operating Engineers, or of any labor organization, subject only to the availability of work.

Collective Bargaining Agreement of 1948

The collective bargaining agreement, (General Counsel Exhibit No. 5), pursuant to the terms of which Mr. Hewes was discharged, expired midnight August 10, 1948. The current contract, (Hewes Exhibit No. 1), took effect August 11, 1948, and the respondent's relations with the several unions signatory thereto continued to be governed by the substantive provisions of this collective bargaining agreement. Since August 10, 1948, therefore, no

employee is required to obtain union clearance prior to taking employment with respondent (Molthan's testimony Page 145, Hibberd's testimony Page 81).

The current contract effective between August 10, 1948, and the present time, cannot be considered to be tainted with any of the objectionable features which the Order found present in the prior contract. The all-inclusive direction by the Board to Respondent with regard to the posting of notice should in no event obtain to this later collective bargaining agreement, the terms of which provide for open-shop operation by respondent, and which contract is in no wise pertinent to the discharge of Hewes.

Proceedings in N.L.R.B. #19-RC-138

Subsequent to the initial hearings in the instant case, a National Labor Relations Board election was held following a hearing in a unit of Respondent, Atkinson-Jones, employees working the construction machine shops at Hanford Works. Machinists Lodge 1743, International Association of Machinists, of which Hewes was a member, was a party to this election as well as Local 370, International Union of Operating Engineers. The National Labor Relations Board saw fit to hold this election in full and complete recognition of the fact that all of the employees of Respondent, Atkinson-Jones, involved were free from any undue influence and that the election might properly be held without the posting of any Notice by the company disclaiming recognition of Engineers Local 370.

As a result of the election of June 24, 1949, Local

370, International Union of Operating Engineers, was recognized by the National Labor Relations Board as the proper collective bargaining representative of Respondent's employees in an appropriate unit in the construction machine shops, and Engineers Local 370 continues to be so recognized.

At the present time there is pending a further, second, successive representation petition of International Association of Machinists, Lodge 1743, (No. 19-RC-601, dated June 8, 1950), covering the same unit of Respondent's employees as appeared in the similar petition out of which grew the election of June 24, 1949.

II.

Closing of the "#3000 Area" Shop

On or about the first day of June, 1949, the 3000 area machine shop where Hewes had been employed ceased operations and has since that time been abandoned by the respondent as an operating shop. The curtailment of operations at this shop and their eventual abandonment as well as the 101 Area shop, which also has since been closed, was predicted in the record by Mr. Hibberd's testimony. (Page 206 of the Transcript.)

Your petitioner has no facts, nor does the record show, that there was any available work for the charging party, Hewes, subsequent to the date of abandonment of this shop. Even at the time of the hearing, to wit, November 4 and 5, 1948, Mr. Hibberd testified to the substantial diminution in work at both the 101 and 3000 area shops even though at

that date there was still some work being performed in those places.

The petitioner herein therefore requests that the Board reopen the record for the purpose of considering and receiving further evidence on this subject, inasmuch as these issues are both pertinent and material to any decision binding on the parties.

III.

The Board concurred with the findings of the Trial Examiner that on August 16, 1947:

> "the work force at the time the contract was signed was not at all representative of that shortly to be employed."
>
> "Under these circumstances, the union could not have been, as required by the proviso, to Section VIII (3), representative of the employees in an appropriate unit."

The Board further pointed up its argument by demonstrating that at the time the contract was signed, a total of 125 manual employees were employed by the Respondent, Atkinson-Jones, whereas, later the work force grew eventually to 5,400 manual employees. The implication therefore may be drawn that sometime between August 16, 1947, and the date of hearing a determination of an appropriate unit might have been made.

At the date of hearing, Respondent, Atkinson-Jones', manual pay roll was enjoying a period of continuous expansion, however at varying rates of growth. Subsequent to the time of hearing, however, an equally radical contraction of the manual

pay rolls has taken place, such that in November, 1949, the total number of Operating Engineers employed by Respondent on the project had fallen from a one-time peak of approximately 1600 to only 27 men. This reduction of force was reflected in comparable reductions in all manual crafts.

At the present time the pay roll is again in the process of expansion, (approximately 300 Operating Engineers employed), and it is impossible to predict what the eventual total employment will be or at what time a stable pay roll will be achieved. In the presence of such pay roll abnormalities, it is respectfully urged that the Board should in the matter of law, refuse jurisdiction over this project.

N.L.R.B. Failure to Process R. C. Petitions

Whether or not these payroll fluctuations were taken into consideration by the Board in its neglect or refusal to process both representation and union authorization petitions of the several unions involved in the Hanford Works operations of respondent, nevertheless the fact exists that prior to June 9, 1949, the date of the decision and direction of election in Case No. 19-RC-138, the Board refused to process all such petitions, including an R. C. petition filed in behalf of Local No. 370, International Union of Operating Engineers, therefore making it virtually impossible for either the Operating Engineers or any other union signatory to the collective bargaining agreement with respondent to comply with the provisions of the amended Act authorizing union representation and union security.

IV.

The Existence of an "Appropriate Unit"

The findings of the Trial Examiner, Page 15, Line 14, hold the bargaining unit described in the August 16, 1947, contract to be inappropriate. Assuming this to be an inappropriate unit, therefore, implies that there must exist an appropriate unit.

As one of the criteria for the determination of an appropriate unit, the Board has consistently looked for a relatively normal and stable pay roll. The reticence of the National Labor Relations Board to process these several petitions before it indicates that the criterion of a normal pay roll had not been achieved to its satisfaction at any time prior to June 9, 1949. In view of subsequent developments, it now appears that a normal pay roll has not as yet been achieved.

The petitioner, therefore, respectfully requests that the Board reopen the record for the hearing of further evidence with regard to pay roll fluctuations subsequent to November 4 and 5, 1948.

V.

The Application of Section 102 of the Amended Act

The application of Section 102 of the Amended Act to the Collective Bargaining Agreement of 1947 was considered in detail by the Board at the hearing held on December 19, 1949, Washington, D. C. The highly pertinent questions posed by both Chairman Herzog and Board member, Murdock,

assumed the application of this Section and considered the point that the 1947 agreement should properly be judged by the application of standards of administrative decisional law developed under the Wagner Act.

Prior to the passage of the Taft-Hartley amendment, the Board as a matter of administrative discretion, had invariably refused to accept jurisdiction over the construction industry. The question is then squarely presented,

> "Shall the 1947 Collective Bargaining Agreement, apparently within the purview of Section 102 of the Taft-Hartley Act, be interpreted in accordance with the rules of decision enforced at the time of its conception or be judged by the ex-post facto application of new policies interpreting a new law?"

Nowhere does the Decision and Order indicate that this question has been squarely faced and answered by the Board.

It is the petitioner's contention that the purpose of the inclusion of Section 102 within the Taft-Hartley Act structure by the Congress must have been proposive rather than meaningless and that the legislative intent may properly be given its framework of meaning in the present case.

VI.

Assumption of Jurisdiction by the N.L.R.B.

The Board has in the very recent past refused to assume jurisdiction of matters involved in the construction industry on the grounds that its assump-

tion of jurisdiction would not effectuate the policies of the National Labor Relations Act as amended. (West Virginia Electric Corporation, 1950, 90 N.L.R.B. #82, June 21, 1950. Pettus-Bannister Company, 1950, 90 N.L.R.B. #80, June 21, 1950.)

The area of administrative discretion which was present under the Wagner Act and which permitted the Board to refuse jurisdiction exists with equal force today and may be applied as the Board sees fit under the facts of the specific case.

The petitioner, therefore, urges that in view of the nature of the work undertaken in the construction program at Hanford Works, the fluctuations in manpower requirements of the program, and the fact that the product to be manufactured in the facilities under construction is specifically excluded by the Atomic Energy Act of 1947 from the channels of Inter-State commerce, the Board reconsider its determination to assume jurisdiction of this matter.

VII.

Brief of the Building and Construction Trades Department of the American Federation of Labor

At the public hearing before the National Labor Relations Board on December 19, 1949, in Washington, D. C., the Building and Construction Trades Department of the American Federation of Labor filed its Brief, which was received and accepted by the Board.

The undersigned petitioner, Party to the Contract, had previous knowledge of the content of said

brief, and to avoid repetition, adopted said brief (with the corrections on pages 18 and 19).

Further, the undersigned petitioner, Party to the Contract, for the convenience of the Board and of the other Parties and to avoid repetition, hereby adopts said Brief, which is attached hereto and hereby made a part hereof and a part of the proceedings in this case, by reference, with the same effect as if set out in full herein.

Conclusion

For the foregoing reasons and upon the grounds stated above, the petitioner herein respectfully urges the Board reconsider its decision and reopen the record for the hearing of further later developed evidence.

By /s/ WILLIAM C. ROBBINS,
Attorney for International Union of Operating Engineers, Local 370.

Of Counsel:

L. PRESLEY GILL,
International Union of Operating Engineers, Local 370.

WILLIAM H. THOMAS,
General Counsel, International Union of Operating Engineers.

Received July 19, 1950.

Filed in formal file.

Before the National Labor Relations Board

[Title of Cause.]

ORDER DENYING MOTION AND PETITION

On June 8, 1950, the Board issued a Decision and Order in the above-entitled proceeding. On July 7, 1950, counsel for the Respondent filed a Motion for reconsideration of the aforesaid Decision and Order; on July 19, 1950, counsel for International Union of Operating Engineers, Local 370, AFL, filed a Petition for reconsideration of the said Decision and Order and for reopening of the record; and thereafter, on August 10, 1950, counsel for Chester R. Hewes, the charging party herein, filed a Reply in resistance to the above motion and petition. The Board having duly considered the matter,

It is Hereby Ordered that the said motion and petition be, and they hereby are, denied, on the ground that they present no matters not previously considered by the Board.

Dated, Washington, D. C., August 25, 1950.

By direction of the Board.

/s/ FRANK M. KLEILER,
Executive Secretary.

Filed in formal file.

Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-28

In the Matter of:

GUY F. ATKINSON COMPANY, a Corporation; J. A. JONES CONSTRUCTION COMPANY, a Corporation, Doing Business as GUY F. ATKINSON COMPANY, and J. A. JONES CONSTRUCTION COMPANY,

and

CHESTER R. HEWES,

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 370, A.F.L., Party to the Contract.

Thursday, November 4, 1948

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 a.m.

Before: Peter F. Ward,
Trial Examiner.

Appearances:

PATRICK H. WALKER,
Seattle, Washington,

Appearing for the General Counsel of the National Labor Relations Board.

WILLIAM C. ROBBINS,
Richland, Washington,

Appearing for Guy F. Atkinson Company and J. A. Jones Construction Company.

E. J. EAGEN,
1228 Joseph Vance Building,
Seattle, Washington,

Appearing for the Charging Party, Mr. Hewes.

L. PRESLEY GILL,
2800 First Avenue,
Seattle, Washington,

Appearing for International Union of Operating Engineers, Local 370, A. F. of L.

PROCEEDINGS

Trial Examiner Ward: This is the formal hearing before the National Labor Relations Board in the matter of Guy F. Atkinson Company, a corporation; J. A. Jones Construction Company, a corporation, doing business as Guy F. Atkinson Company, and J. A. Jones Construction Company; and Chester R. Hewes; and International Union of Operating Engineers, Local 370, A.F.L., party to the contract; Case No. 19-CA-28.

The Trial Examiner appearing for the National Labor Relations Board is Peter F. Ward.

Counsel will please state all appearances for the record, even though you have signed them.

Mr. Walker: Patrick H. Walker, appearing for the General Counsel of the National Labor Relations Board.

Mr. Eagen: E. J. Eagen, appearing for the charging party, Mr. Hewes.

Mr. Gill: L. Presley Gill, 2800 First Avenue, Seattle, Washington, appearing for International Union of Operating Engineers, Local 370, A. F. of L., designated in this proceeding as "party to the contract."

Mr. Robbins: William C. Robbins, appearing for the Guy F. Atkinson Company and J. A. Jones Construction Company. [4*]

* * *

Mr. Gill: Yes, and his affidavit is here.

I wish to argue first as to Item No. 1, which is a motion to strike based upon the appropriation riders, and I have supported that motion by this portion of Mr. Kelly's affidavit.

Mr. Kelly stated that he is the controller of the Respondents and so acted in August as related in the affidavit.

I am interested in the last five lines: "That on or about the 28th day of August, 1947, he caused to be placed upon a bulletin board maintained by the Respondents at the entrance hallway in the southwest wing of the Respondent's headquarters, an administration building designated locally as Building 200-A, North Richland, Washington, a copy of said agreement; that said bulletin board was used,

among other things, for the general requirements of the Respondents in advising all persons entering said building of various matters pertaining to all phases of employment and personal conduct, charitable drives, security directives, etc."

And he says that in addition this place where this contract was posted was also utilized for the purpose of all personnel processing, to the end that any person employed by the Respondents, manual or non-manual, was required to proceed down the above-described hallway for the purpose of reaching the personnel office, and he states further that this building was also used for the additional purpose of toilet facilities and he states in the following affidavit that this posting remained in effect until January 1, 1948, at which time the administrative offices of the Respondent were changed.

* * *

Mr. Walker: May it please the Examiner, a stipulation has been agreed upon between the Respondent—well, an all-party stipulation. It is as follows:

> "It is hereby stipulated and agreed, by and between the parties hereto, that Guy F. Atkinson Company is a corporation organized and existing under and by virtue of the laws of the State of Nevada. J. A. Jones Construction Company is a corporation organized and existing under and by virtue of the laws of the State of North Carolina. On or about July 25, 1947, and at all times since material hereto, Guy F. Atkinson Company and J. A. Jones Con-

struction Company have associated themselves together in a joint venture, doing business under the firm name and style of Guy F. Atkinson Company and J. A. Jones Construction Company, herein called Respondent."

herein called Respondent."

Trial Examiner Ward: Plural?

Mr. Walker: Singular. It is a joint venture, sir.

"At all times material hereto, respondent has maintained an office and principal place of business at Richland, Washington. At Richland, Washington, respondent at all times material hereto has been engaged in construction work pursuant to the terms of letter subcontract No. G-133, an agreement made July 25, 1947, with General Electric Company, a corporation.

"Respondent in the course and conduct of his business at Richland, Washington, causes and continuously has caused materials consisting of cement, lumber, reinforcing steel, glass, paint, hardware, tools, equipment and other supplies of approximately $20,000,000 in value for the period from July 29, 1947, to April 6, 1948, to be purchased and delivered to it at Richland, Washington. Of such materials, approximately $2½ million in value has been purchased, delivered and transported in interstate commerce from and through States of the United States other than the State of Washington. Approximately $9½ million in value of such materials were produced, fabricated and originated from points outside the State of

Washington and thereafter were transshipped to Respondent from points within the State of Washington; that at all times material hereto the title to all materials produced and fabricated by the Respondent vested in the United States of America; and, further, that from the date of purchase and acceptance of all materials by the Respondent, irrespective of point of origin, title thereto vested in the United States of America; that pursuant to the terms of the said letter subcontract Respondent performs a function of procurement of materials, supplies and equipment of its own accord, all functions of procurement relating to its contractual obligations to General Electric Company as prime contractor for the United States Atomic Energy Commission as owner."

That is the stipulation.

Trial Examiner Ward: All parties have joined in the stipulation?

Mr. Robbins: Yes.

Trial Examiner Ward: And the Union?

Mr. Gill: Well, on being assured by Counsel for the Respondent that these facts as recited by the General Counsel are correct, we join in the stipulation.

* * *

WILLIAM S. HIBBERD

a witness called on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner Ward: What is your name?

A. William S. Hibberd.

Direct Examination

By Mr. Walker:

Q. And are you employed, Mr. Hibberd?

A. Yes, sir.

Q. By whom are you employed?

A. Atkinson-Jones.

Q. In what capacity?

A. Labor Relations Manager.

Q. How long have you held that position?

A. Since the 12th of May, 1948.

* * *

Q. (By Mr. Walker): Is the instrument marked General Counsel's Exhibit 5 for identification a mimeographed copy of a labor agreement bearing date of August 16, 1947, entered into between Atkinson-Jones Company and the other parties signatory thereto?

A. Yes, sir; it appears to be.

Q. In the course of your duties, in your official position, have you learned what the geographical jurisdiction of Local No. 370 of the Operating Engineers may be?

Mr. Gill: I object to the form of the question. It is his opinion of what the jurisdiction is. The

(Testimony of William S. Hibberd.)

document indicates what work is covered. The document indicates what work is covered by this Union.

Mr. Walker: Geographical, I said, Mr. Gill.

Mr. Gill: I will withdraw the objection.

Trial Examiner Ward: You may answer.

A. I don't know that I can give it to you exactly, but I can give you a fairly close designation geographically. Everything in the State of Washington east of the 120th parallel, the panhandle of Idaho and a small part of western Montana.

* * *

Q. (By Mr. Walker): Was Mr. Hewes' employment terminated—if you know—on or about February 19, 1948?

A. According to the corporation records his last date of employment was February 19, 1948.

* * *

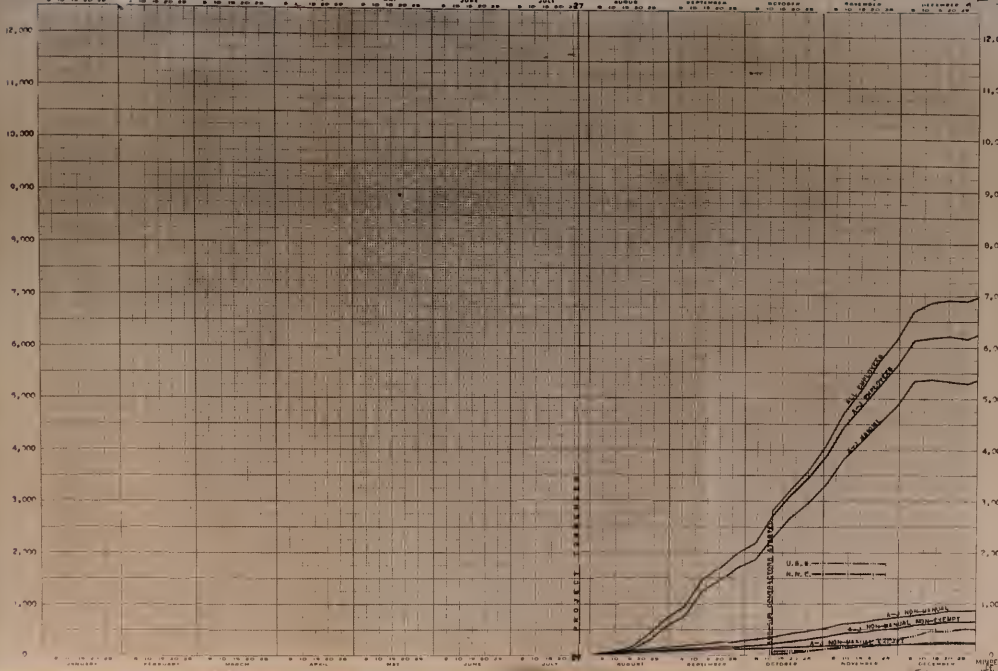
Trial Examiner Ward: The objections will be overruled. General Counsel's Exhibits 2 through I, General Counsel's 3-A and 3-B for identification, General Counsel's Exhibits 4-A and 4-B for identification and General Counsel's Exhibits for identification numbered 5, 6, 7, 8, 9, 10, and 11 will be received in evidence.

(General Counsel's Exhibits 2-A through 2-I, 3-A, 3-B, 4-A, 4-B, and 5 through 11, received in evidence.)

* * *

GENERAL COUNSEL'S EXHIBIT NO. 3-A

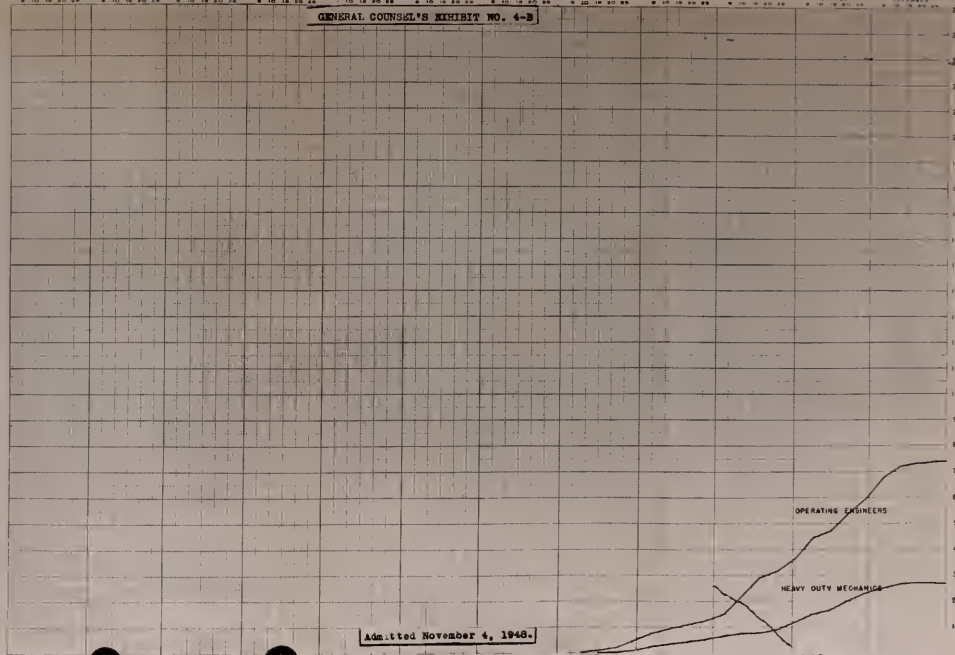
EMPLOYMENT PROGRESS



Admitted November 4, 1948.

EMPLOYMENT PROGRESS OF OPERATING ENGINEERS 1947

GENERAL COUNSEL'S EXHIBIT NO. 4-B



Admitted November 4, 1948.

(Testimony of William S. Hibberd.)

GENERAL COUNSEL'S EXHIBIT No. 5

A-J "Official" File

Agreement

This Agreement is hereby made and entered into this sixteenth day of August, 1947, by and between Guy F. Atkinson Company and J. A. Jones Construction Company, affiliated members of the Associated General Contractors of America, Inc., comprising a joint venture organization under contract with the General Electric Company and the Atomic Energy Commission to perform certain construction work at the Hanford Engineer Works, hereinafter called the Employer and the several International Unions and/or Local Unions affiliated with the Building and Construction Trades Department of the American Federation of Labor having jurisdiction of this territory, hereinafter called the Union, who have, through their duly authorized representatives, executed this Agreement.

Witnesseth

Article I. Parties and Purpose:

Sec. 1. The signatory Employer and the signatory Unions as appear on the signature pages hereof, enter into this Agreement for the purpose of endeavoring to insure continuity of employment, amicable labor-employer relations, and to record the terms of agreement with respect to rates of pay, hours of work and other conditions of employment

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

arrived at through the process of collective bargaining.

Sec. 2. This Agreement contains all of the covenants and agreements between the parties hereto and nothing outside of this Agreement shall modify, amend or add to its terms.

Sec. 3. For the purpose of this Agreement, the party Employer and the party Unions shall be known and referred to hereinafter as the Employer and the Union respectively. And their representatives signing this Agreement hereby warrant and guarantee their authority to act for, bargain for and bind their respective Employer and Union.

Article II. Work Covered:

Sec. 1. The work covered shall be all work performed by the Employer pursuant to its contract with General Electric Company and Atomic Energy Commission for construction of buildings, facilities, and other items of work in connection with Hanford Engineering Works Project. Because of the nature of the work this Agreement is written to cover, the parties hereto mutually agree that the terms hereof shall be subordinate to the provisions of the contract entered into between the Employer and the General Electric Company and the Atomic Energy Commission.

Article III. Recognition—Employees Covered:

Sec. 1. This Agreement shall cover all employees who are members of the signatory unions who are

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

performing work within the recognized jurisdiction of such unions as the same is defined by the Building Trades Department of the American Federation of Labor, for which employees the Union is recognized as the sole and exclusive bargaining agent.

Article IV. Hiring and Employment of Workmen:

Sec. 1. It is agreed that the Employer shall hire all employees coming under this Agreement, through the office of the Union or through such other facility as may be designated by the Union; and such employees shall not be put to work unless and until they present a written referral signed by the proper official of the Union or other designated facility. But provided that in the event the Union shall fail to furnish the needed employees within forty-eight (48) hours, he shall be at liberty, without being deemed in violation of this Agreement, to hire them elsewhere; and provided, employees so hired shall, before going to work, obtain clearance in writing from the Union. The Union agrees that they may apply for and be admitted into membership under their regularly established procedure without discrimination and at their customary rates for fees and dues.

Sec. 2. It is understood and agreed that the Employer shall retain in employment only members in good standing of Union or Those Who have signified their intention of becoming members through the regularly established procedure of the Union.

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

Sec. 3. While the Union assumes all responsibility for the continued membership of its members and the collection of membership dues, it reserves the right to discipline its members and/or those employees who have filed application to become members; and the Employer agrees to, upon written notice from the Union, release from employment any employees who fail to maintain membership in good standing and/or any employee who defaults in his obligation to the Union. It is understood the removal of and replacement of such employees shall not interfere with the operation of the job.

Article V. Sub-Contractors:

Sec. 1. The Employer agrees that any sub-contracts awarded by Employer shall provide that subcontractors will fully comply with this agreement on all work performed by them on said Project.

Article VI. Work Schedule—Overtime—Show Up Time—Holidays:

Sec. 1. Eight (8) consecutive hours, exclusive of lunch period, between 8 a.m. and 5:00 p.m. shall constitute a regular day's work, and forty (40) hours, Monday through Friday, shall constitute a regular week's work for the duration of this Agreement.

Sec. 2. When so elected by the Employer, multiple shifts may be worked for three (3) or more

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

consecutive days; Employer shall have the right to designate the portions of the work to be performed on a multiple shift basis. When two shifts are worked, each shift shall be for a period of eight (8) hours, with not less than thirty (30) minutes off for lunch on the Employer's time. If a third shift is worked, it shall be for a period of seven and one-half (7½) hours, with not less than thirty (30) minutes off for lunch on the Employer's time, except as set forth in the Schedule "A" of the various signatory unions.

The regular starting time for two or three shift work schedules shall be eight o'clock a.m. Monday. On three shift work the regular work week shall commence as above provided with the first shift on Monday, and shall end at the close of the third shift on Friday.

All work performed in excess of eight (8) hours on a regular single-shift basis, and in excess of seven and one-half (7½) hours or seven (7) hours respectively in the case of two and three shift work as above provided, and on work performed outside the regular starting or finishing time of each work day or shift, and all hours worked in excess of forty (40) per week shall be considered as overtime and paid for at the overtime rate as provided in Schedule "A" attached hereto. Except as above provided with reference to shift work, overtime shall be paid for on work performed on Saturday, Sunday, and holidays at the rates specified in Schedule "A."

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

Article VI.

Sec. 3. Travel: It is recognized by Employer and Union that further consideration should be given to the problems of transportation and travel on this Project because of the large area covered by it; it is agreed, therefore, that the amount and the mode of handling same for work within the barricaded area shall be left open for negotiation with the signatory unions prior to commencing construction in the barricaded area.

Sec. 4. Whenever the Employer or his authorized agent calls the Union for employees, and fails to put such employees to work, they shall be paid for two (2) hours call time at the regularly established rate. Any employee reporting for work on his regularly established day or shift, who has worked the previous day or shift, but is not put to work shall receive two (2) hours pay, or if put to work and works less than four (4) hours, he shall be paid for four (4) hours time at the regularly established hourly rate, unless he has been notified by his foreman upon or before the expiration of his previous day or shift not to report for work. Any employee reporting for work and who works more than four (4) hours but less than eight (8) hours shall be paid for eight (8) hours. Provided, however, that such failure to be put to work is not caused by actual inclement weather or breakdown of equipment.

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

Sec. 5. When employees are required to stand by because of temporary breakdowns of machinery, shortage of material, temporary weather conditions, or for any other cause beyond their control, no time shall be deducted for this period nor shall the finishing time of day or shift be extended to make up for time lost.

Sec. 6. Holidays recognized by this Agreement shall be: New Year's Day, Memorial Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving Day, and Christmas Day. Provided that no work shall be performed on Labor Day except to save life or property. If any of the above holidays fall on a Sunday, the following Monday shall be observed as the holiday.

Article VII. Disputes:

Sec. 1. It is not contemplated by any party hereto that there will be caused or permitted any lockout, or strike, or cessation, or slow-down of work, but instead, it is specifically provided that in the event that any disputes rise out of the interpretation or performance of this contract, same shall be settled by means of the procedure set out herein.

Sec. 2. In the event of disputes arising out of this Agreement or the application thereof, the offended party (whether it be the Union or the Employer), shall give notice of such dispute in writing, to the other party, and the following steps shall be immediately taken to adjust the dispute:

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

First: The business representative of the Local Union and the foreman and/or superintendent shall endeavor to adjust the matter. But failing, it shall then be, within forty-eight (48) hours——

Second: Taken up directly by the Local Union and the Employer through their designated representatives; and failing here, the Local Union and the Employer shall——

Third: Each select two grievance committeemen, who shall be charged to, within five days, settle the matter; or

Fourth: Unanimously agree within five days upon a fifth disinterested person to be added to the committee. Any decision reached by majority vote of this committee of five shall be within the scope of this Agreement and must be rendered within twenty (20) days after the selection of the fifth member; such decision shall be final and binding.

Sec. 3. Jurisdictional Disputes: There shall be no cessation or interference in any way with any of the work of Employer by reason of jurisdictional disputes between the various Unions with respect to jurisdiction over any of the work covered by this Agreement. Such disputes shall be settled by the Unions themselves in accordance with the laws of the Building and Construction Trades Department of the American Federation of Labor.

(Testimony of William S. Hibberd.)
General Counsel's Exhibit No. 5—(Continued)

Article VIII. Other Employers and Other Employees:

Sec. 1. While this Agreement is not designed to cover others except members of the Union, it is nevertheless recognized that workmen other than members of the Union may be employed; therefore, as a guarantee that members of the Union shall not be expected to work with non-union workmen, it is mutually agreed that Unions affiliated with the Building and Construction Trades Department of the American Federation of Labor, not signatory to this Agreement may become signatory to this Agreement at a later date, and workmen so covered shall be or shall become members of their respective Union affiliated with the Building and Construction Trades Department of the American Federation of Labor.

Article IX. Health-Sanitation-Safety:

Sec. 1. The Employer and the Union shall comply with all accepted general safety standards and sanitary requirements, whether required by governmental regulations or the terms of this Agreement. The Employer and the Union agree that all foremen must take the required training in first aid as required by law.

Sec. 2. First aid kits shall be kept in handy places on the job at all times.

Sec. 3. Sanitary drinking cups shall be provided

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

and cool drinking water must be kept in clean containers at all times.

Sec. 4. The Employer will furnish warm, dry change rooms of ample size, equipped with heat for drying clothes and with benches for use during lunch periods; these will be situated close to the site of work.

Article X. Miscellaneous Basic Conditions:

Sec. 1. Employees shall be paid on the job before quitting time on Thursday of each week for the full pay-week. When employees are laid off or are discharged, they shall be paid immediately. When employees voluntarily quit they shall be paid within twenty-four (24) hours. Cash, local checks or checks upon which there is no charge for exchange shall be the pay medium.

Sec. 2. Authorized representatives of the Union may visit the site of work with the consent of the Contractor, provided they do not interfere with the operation of the work. Any visiting on the job site shall be in strict compliance with the security regulations established for the Project.

Sec. 3. No Steward shall be discharged for the performance of his duties pertaining to Union affairs.

Sec. 4. No rules, customs, or practices shall be permitted that limit production or increase the time required to do any work. There shall be no limitation on or restriction of the use of machinery, tools, or other labor-saving devices.

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

Article XI. Addenda:

Sec. 1. It is expressly understood and agreed that there is attached hereto wage scales and working rules as provided for in Schedule "A" as mutually agreed by the Employer and the Union, which addenda are by this reference made a part of this Agreement as though fully set forth in the body of the Agreement.

Article XII. Saving Clause:

Sec. 1. If any provision of this Agreement, or the application of such provision, shall in any court action, be held invalid, the remaining provisions and their application shall not be affected thereby.

Article XIII. Effective Date and Duration:

This Agreement entered into this sixteenth day of August, 1947, shall be effective on all work covered hereby, as of August 1, 1947, and shall remain in full force and effect until August 1, 1948, and from year to year thereafter for the life of the Contract between Employer and the General Electric Company above referred to, unless notice is given in writing by the Unions or the Contractor to the other party, not less than sixty (60) days prior to the expiration of any such annual period, of its desire to modify, amend, or terminate this Agreement, and in such case the Agreement shall

(Testimony of William S. Hibberd.)

General Counsel's Exhibit No. 5—(Continued)

be opened for modification, amendment, or termination, such as the notice may indicate at the expiration of the annual period within which the notice is given.

After receipt of any such notice, the parties shall begin negotiations within thirty (30) days.

RTICLE XIII. (Continue

The wage rates and provisions to be paid to the various classifications of work ereunder shall be as set out in Schedule "A," which wage rates, however, shall become ffective only after approval by the General Electric Company and the Atomic Energy ommission. The EMPLOYER agrees to promptly submit this contract for such approval nd to request that such rates be effective on all work performed hereunder, from nd after August 1, 1947, during the life of this contract.

Conversely each signatory Union reserves to itself the right to promptly withraw its acceptance of this AGREEMENT unless this Contract and that portion of chedule "A" submitted by said Union are approved by General Electric Company and he Atomic Energy Commission, as submitted herein, so as to permit EMPLOYER to comly therewith.

RTICLE XIV. ADDITIONAL SIGNATORIES:

Sec. 1. In addition to the UNIONS which have signed this AGREEMENT and become arties hereto on the date hereof, other UNIONS affiliated with the Building and Contruction Trades Department of the American Federation of Labor may, from time to time, ecome additional parties, and may have the benefits of this contract and assume the iabilities thereof by affixing their signatures hereto by their duly authorized repreentatives and attaching hereto their wage scales agreed to by the said UNIONS and ontractor.

IN WITNESS WHEREOF the parties have caused this contract to be executed by their uly authorized representatives.

FOR THE EMPLOYER

uy F. ATKINSON COMPANY
T. A. JONES CONSTRUCTION COMPANY

y [signature]
Vice President, Ruy F. Atkinson Company

FOR THE UNION

International Laborers Union
Robert B Shuck
Local Louisian Labors 348
Painters International
Ye Spouse
Ye Spouse Painters 11th yr
of Carpenters
Brotherhood
Washington State
Building Council of Carpenters
Local Modesto Carpenters Local 1846
G.W. Eggiman Int Union oper Engineers
International Seamstress L.U.
P.F. Hansen

98h

ley J. Knapp Local 478
Plasterers & Cem. Finishers

FOR THE EMPLOYER

THE UNION

Dist Rep Sheet Metal Wkrs.

✓E.P. Eilmes

Wood. Wire & Metal Lathers

✓Walter Tuomey

General Organizer,

Bridge & Structural Ironworkers

✓J.J. Hurley

✓W.F. Matthews B.M. & P.H.

General Organizer of the Plumbing and Pipefitting Industry of the United States and Canada

✓Martin Fitzpatrick

International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America,

✓By John Stender

John Stender, Bus.Agt., Welders Local 541

✓A.F.O'Neill A.F. O'Neill

Bus.Agt., Boilermakers Loc.104

✓Homer Parrish Homer Parrish

International Representative

Local Union #112 I.B.E.W.

✓Jno Wiseman Bus. Mgr.

Slate & Tile and Composition Roofers, Damp and Waterproofers Association:

By

FRANK N. TWIDDELL, Int'l Rep.

By Frank N. Twiddell

FLOYD PETERSON, Secy Local #31 Yakima Wash

By Floyd Peterson

Admitted November 4, 1948.

98

(Testimony of William S. Hibberd.)

GENERAL COUNSEL'S EXHIBIT No. 10

Guy F. Atkinson Company
and
J. A. Jones Construction Company
Richland, Washington

Layoff Card

Foreman: Turn this in with your Time Card marked in full.

Man's No.: 39-232.
Name: Chester H. Hewes.
Date of last day worked: 2/19.
Hrs.: 1327 (6) 2-20.
Reason: Union Request.

1. Quit ☐
2. Discharged ☒
3. Not Qualified ☐
4. Temporary Layoff... ☐
5. Work Completed.... ☐

Reason for Discharge: Drunkenness, Irregularity, Loafing, Insubordination, Trouble Maker, Refusing to take Orders. Please refer this man to the Time Office.

Do you Want This Workman Back Again?

Yes.....

No.....

Foreman's No.: 1-133. Name:

Admitted November 4, 1948.

(Testimony of William S. Hibberd.)

GENERAL COUNSEL'S EXHIBIT No. 11

(Copy)

International Association of Operating Engineers
Affiliated With the Amedican Federation of Labor

Hoisting and Portable Engineers
Local Unions Nos. 370, 370-A, 370-B, 370-C
A. A. Rossman, Business Mgr.
219 South Browne St., Spokane 8, Washington
Pasco, Branch Office
110 N. 2nd, Pasco, Washington

February 16, 1948.

Mr. D. Russell Gochnour, Labor Relations Manager,
Guy F. Atkinson Co. and J. A. Jones Construction Co.,
Richland, Washington.

Dear Mr. Gochnour:

I am requesting the removal of Chester R. Hewes, machine tool operator, from the Hanford Project. This man has absolutely failed in his financial obligation to this Local Union.

Thanking you for your cooperation and with kind personal regards, I am

Very truly yours,

/s/ RAY CLARKE,
Representative, Local 370,
Pasco, Branch Office.

RC:rs

(Testimony of William S. Hibberd.)

HEWES EXHIBIT No. 1

Construction-Collective Bargaining Agreement Hanford Works, State of Washington

This Collective Bargaining Agreement (hereinafter called Agreement) by and between Atkinson-Jones Construction Company, an affiliated member of the Associated General Contractors of America, Inc., presently party to a Subcontract with the General Electric Company, as Prime Contractor, and the U. S. Atomic Energy Commission, as Owner, to perform certain construction work at the Hanford Works, State of Washington (hereinafter called the Employer), and the several individual International Unions or Local Unions, signatory hereto, each being an affiliate of the Building and Construction Trades Department of the American Federation of Labor, and as such exercising craft jurisdiction over the territory wherein the Hanford Works are located (hereinafter called the Union), and each party hereto having executed this Collective Bargaining Agreement through representatives having power and authority so to do:

Witnesseth:

Article I.—Purpose

Sec. 1. The Employer has entered into a Subcontract with the General Electric Company, which company is in turn a Prime Contractor under the U. S. Atomic Energy Commission, as Owner. Under

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

the provisions of that Subcontract the Employer currently is engaged in supplying certain construction requirements of the General Electric Company in various areas located at the Hanford Works, State of Washington. In performing under this Subcontract the Employer requires, and will require, a large number of skilled craftsmen and workmen customarily found only among members of trade unions. It is the purpose of this Agreement to secure competent and capable workmen for the performance of the work undertaken by the Employer; to maintain a continuity of employment to workmen so secured; to insure amicable Labor-Management relations and, further to record the terms of Agreement with respect to rates of pay, hours of work and other conditions of employment arrived at through the process of collective bargaining.

Article II.—Parties

Sec. 1. For the purpose of this Agreement, the party Employer and each party Union shall be known by and referred to hereinafter as the Employer and the Union, respectively. The representatives of the Employer and the Union signing this Agreement hereby warrant and guarantee their authority to act for, bargain for and bind the Employer and the Union, respectively, signatory hereto.

* * *

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

Article IV.—Work Covered

Sec. 1. This Agreement shall cover all work performed by the Employer pursuant to its Subcontract with the General Electric Company, as Prime Contractor, under the U. S. Atomic Energy Commission, as Owner, for the construction of certain buildings, facilities and other items of work in connection with the Hanford Works, State of Washington. Because of the nature of the work being performed by the Employer, it is mutually understood that all Federal Labor Laws and Regulations applicable to heavy and special construction contracts for the Government, as Owner, are paramount to the terms and provisions of this Agreement.

Article V.—Recognition

Sec. 1. This Agreement shall govern the employment of workmen who are employed by the Employer within the recognized jurisdiction of the signatory Union as the same is defined by the Building and Construction Trades Department of the American Federation of Labor. The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for workmen so employed, subject to the exclusions contained in Section 2 (11), (12), of the National Labor Relations Act, as amended.

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

Article VI.—Selection of Workmen

Sec. 1. The Employer agrees to establish an employment office in the City of Pasco, Washington, and all manual workmen required by him shall be hired through that office. The Employer shall hire only qualified and competent workmen to perform services required and recognized as within established craft jurisdiction, and such workmen, shall be procured from sources fully qualified to supply them. The Union agrees, when requested by the Employer, to furnish workmen who are qualified and competent to perform the work of their craft.

Sec. 2. It is mutually agreed that Unions affiliated with the Building and Construction Trades Department of the American Federation of Labor, not signatory to this Agreement may become signatory to this Agreement at a later date, and workmen so covered shall be or shall become members of their respective Union affiliated with the Building and Construction Trades Department of the American Federation of Labor subject to the operation of Article VII—"Union Security."

Article VII.—Union Security

Sec. 1. In the event the respective Union shall qualify and procure necessary authority as required by Sec. 8 (a) (3) of the National Labor Relations Act, as amended, then upon such qualification and

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

procurement of authority, the following provisions shall become effective:

(a) All workmen employed by Employer to perform work within the properly determined craft Jurisdiction of the respective Union, shall become members of Union on the 30th day, or immediately thereafter, following the beginning of their respective employment, or on the 30th day, or immediately thereafter, following the date of this Agreement, whichever is the later date, and shall thereafter maintain membership in good standing in Union as a condition of employment. Union shall notify Employer, in writing, of any workman, who, subject to the foregoing provisions is claimed to be not in good standing and such notification shall be presented at least five (5) working days before requesting the discharge of any such workman.

Sec. 2. If and when the provision set forth in Sec. 1 of this Article VII shall become effective, Employer shall thereafter fully cooperate with Union in the enforcement of such union shop provision.

Sec. 3. Until completion of the 30-day period described in Section 1 of this Article, non-union workmen may be discharged or disciplined at the sole discretion of the Employer.

Sec. 4. The Employer agrees to keep the re-

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

spective Union fully informed regarding workmen hired and workmen terminated.

Sec. 5. A copy of Section 1-A and Sections 3 and 4 of this Article shall be furnished by the Employer to each workman hired under the terms hereof.

Sec. 6. In the event the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 should be further amended by the Congress or construed by the decision of the United States Supreme Court so as to exclude the construction industry from its operation and scope, or the National Labor Relations Board denies itself jurisdiction over the work covered hereby, during the life of this Agreement, Article VI—Selection of Workmen and this Article (Union Security) shall be deleted and in lieu thereof there shall be inserted as a substitute Article and made as a part of the basic Agreement the following described Article:

"Hiring and Employment of Workmen"

"Sec. 1. It is agreed that the Employer shall hire all employees coming under this Agreement through the office of the Union or through such other facility as may be designated by the Union; and such employees shall not be put to work unless and until they present a written referral signed by the proper official of the Union or other designated facility. But provided that in the event the Union

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

shall fail to furnish the needed employees within forty-eight (48) hours, the Employer shall be at liberty, without being deemed in violation of this Agreement, to hire them elsewhere; and provided, employees, so hired shall, before going to work, obtain clearance in writing from the Union. The Union agrees that such employees so hired may apply for and be admitted into membership under the regularly established procedure of the respective Union.

"Sec. 2. It is understood and agreed the Employer shall retain in employment only members in good standing of Union or those who have signified their intention of becoming members through the regularly established procedure of the Union.

"Sec. 3. While the Union assumes all responsibility for the continued membership of its members and the collection of membership dues, it reserves the right to discipline its members or those employees who have filed application to become members; and the Employer agrees to, upon written notice from the Union, release from employment any employees who fail to maintain membership in good standing or any employee who defaults in his obligation to the Union. It is understood the removal of and replacement of such employees shall not interfere with the operation of the job. Any other Articles or Sections of Articles in this Agreement inconsistent with this Article shall be deleted

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

from the Agreement in conformity with the intent of this Section."

* * *

Article XVIII.—General Saving Clause

Sec. 1. It is not the intention of either the Employer or the Union, party hereto, to violate any Federal laws, governing the subject matter of this Agreement. The parties hereto agree that in the event any provisions of this Agreement are finally held or determined to be illegal or void as being in contravention of any applicable law, the remainder of the Agreement shall remain in full force and effect unless the parts thereof so found to be void are wholly inseparable from the remaining portion of this Agreement. The article hereof relating to Union security is intended to be separable. Further, the Employer and the Union agree that if and when any or all provisions of this Agreement are finally held or determined to be illegal or void by the National Labor Relations Board, or on review by a court of final and competent jurisdiction, an effort will be made to then promptly enter into negotiations concerning the substance affected by such decision for the purpose of achieving conformity with the requirements of any applicable law and the intent of the parties hereto.

Article XIX—Effective Date and Duration

Sec. 1. This Agreement, entered into this

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

day of August, 1948, shall be effective on all work covered hereby as of August 10, 1948, and shall remain in full force and effect until August 10, 1949, and from year to year thereafter for the life of the Contract between Employer and the General Electric Company above referred to (subject to the exception created by Section 2 hereof), unless notice is given in writing by the Unions or the Employer to the other party, not less than sixty (60) days prior to the expiration of any such annual period, of its desire to modify, amend or terminate this Agreement and in such case the Agreement shall be opened for modification, amendment or termination such as the notice may indicate at the expiration of the annual period within which the notice is given. The parties shall begin negotiations within thirty (30) days after receipt of this notice.

Sec. 2. Wage Negotiations: It is agreed that the wage scale set forth in Schedule "A" attached hereto may be renegotiated once during any Contract year covered by this Agreement. Either the Employer or the Union desiring to negotiate wages shall give the other party thirty (30) days notice of its intent so to do. The party receiving said notice shall be prepared to enter into negotiations within fifteen (15) days from the receipt thereof. The effective date for any change in wages or other payments resulting from such notification shall be a separate subject of agreement between the parties at that time.

(Testimony of William S. Hibberd.)

Hewes' Exhibit No. 1—(Continued)

Article XX.—Interpretation

This Agreement, with any Exhibits and the Schedules "A" attached hereto, which are subject to separate negotiations, contains all of the covenants and agreements between the Employer and the Union. Nothing outside of this Agreement shall modify, amend or add to its terms and provisions unless accomplished by the execution of a formal supplemental agreement, negotiated and executed by and between the parties hereto.

Admitted November 5, 1948.

Cross-Examination

By Mr. Gill:

Q. Do your records show any application by Mr. Hewes for his former job, or a similar job, after February the 18th, 1947?

A. No. We have no application blank in the records.

* * *

Q. (By Mr. Robbins): I believe in response to Mr. Gill's question regarding the hiring procedures followed by Atkinson-Jones you stated, Mr. Hibberd, that the Union introductory card received by the Union was a part of the respective manual employees files. Now, is that presently true today, as to new hirers?

(Testimony of William S. Hibberd.)

A. Not to all new hirers. Whenever we request men from the Unions, they do identify those men with a slip of some kind, each one of the Unions. However, it is not a requirement under the present labor contract.

Mr. Robbins: That is all. Thank you.

Mr. Gill: One question, if I may interrupt.

Q. (By Mr. Gill): In response to this last answer that you gave, is your answer applicable at all times since August 10, 1948? A. Yes.

* * *

WILLIAM J. KECK

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. What is your name?

A. William J. Keck.

Q. Mr. Keck, you are an employee of the Respondent, are you? A. Yes, sir.

Q. And you hold the position of Superintendent of the Automotive Repair Shop of the Respondent?

A. Yes, I do.

Q. And you have held that position since before November 4, 1947, and at all times since?

A. September 29, 1947, I went to work.

Q. Are you acquainted with the charging party here, Mr. Chester R. Hewes? A. I am.

(Testimony of William J. Keck.)

Q. Did he enter the employment of the Company on or about November 4, 1947?

A. I couldn't exactly say at what time, but he came on the payroll due to the fact that before I got the shop set up there were several men hired and farmed out in different departments around the field.

Q. Did Mr. Hewes work in your automotive repair shop under your direction? A. Yes.

Q. During all the time he worked there, were you familiar with his work? A. I was.

Q. During all the time he worked there, was his work competent and satisfactory to the Company?

A. It was.

* * *

JAMES J. MOLTHAN

a witness called by and on behalf of Guy F. Atkinson Company and J. A. Jones Construction Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Robbins:

Q. Will you state your full name for the record?

A. James J. Molthan.

Q. And your profession?

A. I am an attorney.

Q. You were employed by Atkinson-Jones. Will you explain in what capacity and for what period of time?

(Testimony of James J. Molthan.)

A. Beginning 31 October, 1948, I was employed by the Guy F. Atkinson Company and the J. A. Jones Construction Company in their Richland operations where they do business as Atkinson-Jones, joint venturers, and continued in that employ under the title of Manager of the Contract and Claims Section of the Atkinson-Jones enterprise until date 24 September, 1948.

Q. I beg your pardon. Was that first date that you expressed 1947 or 1948?

A. If I said '48, it should be 31 October, 1947.

Q. In that capacity were you a member of the management group of Atkinson-Jones?

A. The position I occupied was regarded as an executive position by the local management of Atkinson-Jones, and I—it would be best described, as far as pure legal matters were concerned, as an administrative assistant to the General Manager.

Q. Now, in that position did you have recourse to all of the files of the joint venture?

A. I had recourse to the files of all departments.

Q. Whenever the need arose for you to review them? A. That is correct.

Q. Did you also have a hand in the formulation of policy?

A. General policy that took in relationships of any type would see my office, and myself as the individual concerned, consulted in the formulation of the policy.

Q. Would that category include labor relations, labor policy?

(Testimony of James J. Molthan.)

A. All matters relating to the application of any Federal or State statute to the labor relations of Atkinson-Jones on the Richland job would be referred to me.

Q. I have a copy of General Counsel's Exhibit No. 5. I believe you have a copy available, Mr. Molthan. Will you tell me if you recognize that? That purports to be a contract with certain unions of the Building and Construction Trades Council in Pasco.

A. I have been handed a photostatic copy of what I know to be a collective agreement negotiated by and between the Guy F. Atkinson Company and the J. A. Jones Construction Company and several component unions of the Pasco Building and Construction Trades Council with certain other International Unions affiliated to the Building and Construction Trades Department of the American Federation of Labor. The exhibit was executed between the parties on the 16th day of August, 1947, with the effective date being 1 August, 1947.

Q. Are you competent because of your knowledge of the files of the Atkinson-Jones joint venture and because of personal knowledge surrounding the work out of this contract to testify both as to the circumstances surrounding its inception——

A. I believe I am competent to describe the manner in which the contract was negotiated and executed by and between all parties.

Q. Yes. I would refer you to General Counsel's Exhibits Nos. 11 and 12—I believe those are cor-

(Testimony of James J. Molthan.)

rect—which purport to be two letters received by Mr. Gochnour under date of February 16th from Mr. Clarke.

A. I am familiar with the letters. One letter, which contains a description of a group of members of the Operating Engineers, Local 370, under date of 16 February, was received by Mr. Gochnour, then the Labor Relations Manager of Atkinson-Jones, and by him referred to me for an opinion. In reviewing the letter I felt the Union request contained therein was beyond the scope of the collective agreement we had signed and advised the Labor Relations Manager we would take no action.

The letter called for us to go out and contact various individuals, allegedly members of the Operating Engineers, with a view of telling them that if they didn't pay their dues we were going to discharge them. We were under no contractual obligation to do that on behalf of the various Unions with whom we were dealing at that time.

I believe then the letter was recalled by the Operating Engineers and a second letter was directed to our Labor Relations Department on the same date, February 16, 1948, wherein the Union requested the removal of the complainant by name.

My present recollection is, we received several letters on that date where other individuals were named by the Operating Engineers' Union as being in default on obligations allegedly incurred by the employee of Atkinson-Jones to that local union.

As a result of this letter of February 16th de-

(Testimony of James J. Molthan.)

manding the removal from our payroll of the complainant, Chester R. Hewes, I caused to be initiated a complete investigation surrounding the circumstances of Mr. Hewes, his affiliation to the Operating Engineers' Union. I demanded documentary proof from the Local representatives—by Local I mean the Pasco representatives of Local 370—first, that Mr. Hewes was in fact a member of that union; secondly, that Mr. Hewes was actually in default insofar as any obligation he might have growing out of that membership to that union was involved.

It developed they were able to make a showing that Mr. [109] Hewes had applied for and been accepted into membership by Local 370; that thereafter he had defaulted in financial obligations toward that Union. It was because of this default that they regarded him as not being in good standing, allegedly, and demanded that we discharge him.

The collective agreement which has been referred to as General Counsel's Exhibit No. 5 saw the Atkinson-Jones concern assume an obligation growing out of Article IV, Sections 1, 2 and 3, thereof, wherein upon receipt of written notice from any of the signatory unions that a member of those unions was not considered in good standing, or defaulted in any of his obligations to those unions, the employer agreed to discharge him from his payroll.

It was this article, specifically Section 3 of the article, upon my review that compelled me to the

(Testimony of James J. Molthan.)

conclusion that we had no alternative in view of our collective agreement but to discharge Mr. Hewes and various other members of Local 370 who were in default, and the Local Union was able to establish the fact of that default.

So for that reason, and because of the operation of that article, and relying upon the fact that we did have this collective agreement with Local 370, we discharged Mr. Hewes from our payroll.

* * *

Cross-Examination

By Mr. Walker:

Q. Mr. Molthan, do you know whether at the time negotiations were going on, looking toward what was eventually executed as—and identified as General Counsel's Exhibit No. 5, whether the representatives of Atkinson-Jones requested of Operating Engineers any submission of any evidence of claim of representation?

A. Categorically, no. Could I enlarge a little on that statement?

Q. All right.

A. We felt, as members of the Associated General Contractors, with all the unions signatory to Exhibit No. 5—may I explain the labor policy somewhat in the execution of these construction type contracts?

At the time we went into this—it was actually, I think, the 28th of July—we were advised that we

(Testimony of James J. Molthan.)

had been awarded a contract by General Electric Company.

They set up the scope of our work, originally under the letter order, as $8,000,000 of construction, which called for the establishment—or, rather, the erection of a series of residential units in the City of Richland, and the construction of the construction camp area in North Richland.

That was our project at the time we negotiated the present contract which is under attack here.

We relied upon the Building Trades Department of the American Federation of Labor to man that job.

When we came into the Hanford area, we had no Associated General Contractors area agreement for our purpose. Ordinarily the Associated General Contractors will negotiate area agreements and then members coming into the area to do any kind of work, build a dam, a highway or a tunnel, avail themselves of that agreement. The Spokane Chapter of the Associated General Contractors exercises what, I imagine, a Union would term jurisdiction over the area in which the Hanford Works are set up. They had no agreement for our purposes, so it was necessary for us to negotiate an agreement, and we went into the—to the International Unions with whom we always do our business and asked through the agency of Mr. Harry Aimes, who is Executive Secretary of the Washington State Department of the Building Trades and Construction Department of the American Federation of

(Testimony of James J. Molthan.)

Labor, to arrange for our meeting with all the representatives, International or Local, that could be made available to us on short notice.

He set up the Unions that were represented at a series of negotiations that began in Spokane on the 14th day of August, 1947, and ended on the 16th day of August, 1947, with an agreement upon General Counsel's Exhibit No. 5.

Our representatives were Mr. Ray Northcutt and Mr. Don Grant.

I will identify Mr. Don Grant as secretary of the Guy F. Atkinson Company.

Other persons representing General Electric or the Government were there, but not negotiating. They were there merely to observe the negotiations.

There was considerable urgency about getting the work started at Hanford at that time. [129]

We did not ask for any of the Unions that signed this agreement to make a showing that they, in fact, represented persons employed by Atkinson and Jones because actually we had no employees. It is customary in the construction industry to get your working agreement settled, your wage rates settled through the area agreement, if possible, or set up a special job agreement, as we were required to do at Hanford, and then rely upon the unions signatory to man the job.

We were able to do this prior to the application of the Labor-Management Relations Act of 1947, to the heavy construction and specialized construction industry.

(Testimony of James J. Molthan.)

Now that that Act is effective, we had to abandon that practice and the present collective agreement in effect at the Hanford Works is substantially different.

In August of 1947, we followed our traditional pattern, and there was no question raised as to whether or not the unions represented employees, because what we were buying was the Unions' personnel that they were going to secure to man the contract.

Q. Was there any discussion with the Engineers during that negotiation relative to an appropriate collective bargaining unit?

A. The unit in the construction industry prior to the application of the Taft-Hartley Act was the creature of the asserted jurisdiction of the Unions. I might say categorically that it has always been troublesome because the Unions are never in agreement as to what their jurisdiction may or may not be and occasionally the employer finds himself caught in the bight of the line in trying to determine which has jurisdiction, but prior—at the time we accepted the established jurisdiction of the Unions and prayed that possibly that jurisdiction would persevere through the life of the contract without too much difficulty.

But we never set up a unit as such.

* * *

Q. (By Mr. Eagen): Mr. Molthan, handing you what has been marked for identification as Hewes 1, will you state what that is? If you know.

(Testimony of James J. Molthan.)

A. This is a copy of the present collective agreement between Atkinson-Jones and the Unions signatory thereto.

The exhibit as handed me does not have the signature pages attached to it, and to have a complete collective agreement we would have to have the schedule "A" referred to in Article XIX, Section 2. That schedule is in the process at the present time of being approved by the prime contractor and the Atomic Energy Commission as to whether or not the cost plus a fixed fee contractor will be allowed to pay them.

That is a requirement that is peculiar to the Government type of contract there and it may be some time before the entire contract will be complete in respect to Schedule "A."

The language here is the sole language that governs the contractual relationship between any Unions signatory thereto and Atkinson-Jones at the present time.

Q. Local 370 is one of the parties signing the agreement?

A. They were one of the parties signing the agreement.

I would like to state—may I go off the record just a minute?

Trial Examiner Ward: Yes.

(Discussion off the record.)

Trial Examiner Ward: On the record.

Mr. Eagen: Mr. Examiner, the parties have

(Testimony of James J. Molthan.)

agreed that Hewes' 1 can be received in evidence with the understanding that Respondent will furnish a complete copy of the contract which is to be substituted for Exhibit 1 which does not have the last couple of pages attached to it, including the signatures.

Trial Examiner Ward: Very well, the Exhibit will be received pursuant to the stipulation.

The reporter is directed to return the exhibit when the Respondent provides him with a complete copy, which copy shall be marked Hewes' Exhibit 1 in evidence.

(Hewes' Exhibit 1 received in evidence.)

* * *

Q. Calling your attention to the Spokane negotiations of August 14th to 16th, 1947, which were consummated in General Counsel's Exhibits 5 and 6, being the agreement, was there at that time any urgency with respect to commencing immediate construction work under the document which was then being negotiated?

A. Once the letter order had been handed to Atkinson and Jones, a period of about six weeks of contract negotiations was terminated around the 28th of July. Then the demand was immediate and urgent that we go to work.

We had sat for six weeks in preliminary contract negotiations and the hour was running late. So we were supposed to have a functioning organization set up overnight, and we attempted to do it.

(Testimony of James J. Molthan.)

We had to make a showing that we had the personnel available and we had to make a showing that we had material to start work with and the administrative and executive personnel available.

Q. Because of that urgency for immediate construction, did A-J immediately proceed to secure workmen?

A. We started employing. I think our first—our non-manuals, we began to bring them up around the 29th of July.

Q. The very following day?

A. That is correct.

Q. A-J immediately proceeded to hire workmen in accordance with their contract with the prime contractor, G.E.?

A. I would like this record to show that the policy of contractors in construction is somewhat different than the production or the manufacturing employer.

When we have a job, a contract is awarded—for instance, take the construction of a dam. We might have on our permanent payroll maybe 300 people. These are the backbone of your organization. You will hang onto your superintendents. You will hang onto your qualified accountants and that, and you will keep them even though you may not have any work. Then you may get a contract by competitive bidding that will necessitate building an organization maybe of 30,000 people to swing the entire contract. And we start from scratch, but between jobs those people will be off our payroll and work

(Testimony of James J. Molthan.)

for other contractors, so we always have this—what they call the initial lag of getting a job started. We have got to start from our administrative nuclear group of key personnel and build up immediately to get the number of qualified persons of all types we may need for the performance of a given contract.

That was the case here. We have a big organization. Both Atkinson and Jones are amongst the nation's largest heavy construction contractors, but we have a lot of contracts and when we get a new one such as here, or the McNary job, we have to start building an organization as against the given contract.

Q. Now, did that policy which you have just explained continue uninterrupted at all times following July 29, 1947?

A. From July 29 to roughly, I would say, around the 10th of September we were trying to get together the nucleus of the working forces that now comprises the Atkinson-Jones organization, superintendents, key personnel, clerical and management, and enough men in the manual brackets to get the job going. Those were our objectives from about July 29th to September 10th. By September 10th organization began to take form.

Q. And included in those jobs you were seeking to acquire personnel with people performing work under the jurisdiction of Local 370?

A. Traditionally, as general heavy construction contractors, we rely for our main personnel in our

(Testimony of James J. Molthan.)

work on the Operating Engineers and the common laborers.

Q. And in connection with this job, would your payroll demands include craftsmen following the trade of Local 370 members as being among the first to be called?

A. That is right. You have to begin to prepare your soil for structures and that is generally work performed by the Operating Engineers.

Q. And at the time of these negotiations, and during the period there from August 14th to 16th, 1947, was A-J following the policy of securing persons following the occupations as covered by Local 370's jurisdiction for work?

A. Our anticipation when we went on the job was that we were going into a construction job nowise dissimilar from any other construction job that we had had prior experience with, and we relied on the Unions we thought we would need in setting up our job mapping requirements.

Q. And by reason of that necessity, did you, during that period of negotiations, have with Local 370 requests to furnish men?

A. I believe they were supplying us men even prior to having a contract. On August 16th we had members of the Operating Engineers on our payroll at the request of individual representatives.

Q. Now, during the course of those negotiations did representatives of Local 370 inform you and your associates that they were then supplying you members for this job under A-J and that it was a

(Testimony of James J. Molthan.)

policy of Local 370 to furnish men only under a closed shop or so-called Union shop conditions?

A. I don't know whether they informed us at that time. It is our experience that we have to give a closed shop as an inducement to any union. We have to give some form of Union security to the Union.

Q. Otherwise they won't man the job?

A. Otherwise there is no incentive to the Union to go looking all over the United States for men to do the work for us.

* * *

Q. (By Mr. Gill): Mr. Molthan, with respect to the construction activities of A-J as they commenced on July 29, 1947, what demands were there as far as A-J was concerned for manual employees?

A. Well, as I have stated, our project was an estimate of $8,000,000 worth of residential type construction and the preparation of a construction camp to house construction workers in North Richland, and the pattern of bargaining in the construction industry would indicate for that type of work that we would need carpenters, operating engineers and common laborers to get the job started.

Q. And in what quantities would you need those three separate crafts to get the job started?

A. Well, the need for them would be immediate, and the quantities on that—of course, this is subject to everybody's opinion, which is as good as mine, but we would at least need of the three crafts,

(Testimony of James J. Molthan.)

skilled, roughly a thousand men to get the thing properly going in all phases of it.

Q. And in respect to the Engineers, what would be the demand at the beginning?

A. There seems to be agreement among construction men that you could divide it up roughly 33⅓% between each of the three named labor groups.

* * *

Q. (By Mr. Gill): And as this preliminary work progressed would additional numbers of these crafts and additional numbers of other crafts be required?

A. That's correct, when you get into the finishing phases.

Your job starts, of necessity, by preparing your soil for the structure. We need the teamsters and we need the Operating Engineers for that. The earth moving requires that.

Q. About how many weeks would you have that demand for approximately 1,000 men, of those three categories?

A. Well, the employment graph that has been introduced here as General Counsel's Exhibit No. 2, and there is a series there, will show a slight leveling off in our employment policy beginning around the 10th of September and continuing for the balance of the month of September, 1947. And the actual number of men required, I don't feel that I am too competent to testify to. That is a phase of construction that is——

Q. Well, with respect to the thousand men, if I

(Testimony of James J. Molthan.)

understand you correctly, you would need them as fast as you could get them?

A. That is right, the need is urgent.

Q. If you could have gotten a thousand men in the first few days following July 29th, you would have work available for them to do?

A. If we had—if we knew that we could operate without the Unions in the west, let us say, and could have gone to Seattle and got a thousand men in those classifications, free of any union pattern, we undoubtedly would have gone right into Seattle and brought them around the 1st of August and could have done it.

Q. You could have had work available for them the first of August, for a thousand men?

A. Yes. Our experience as western contractors is, of course, that we have to go to the unions on this type of work.

Q. By reason of the long experience you have had in this type of work, and the long experience of the two separate corporate contractors who amalgamated in the joint venture, are you acquainted with the sources of manpower to supply that original demand of a thousand men and subsequent demands? A. I am; yes, sir.

Q. What are the facts with regard to the available pools?

A. In the State of Washington the construction contractor goes directly to the construction department—to the construction unions for his manpower. That has been a condition that has existed since approximately 1928, or thereabouts.

(Testimony of James J. Molthan.)

Q. Are you referring to the affiliated unions of the International Unions belonging to the Building Trades Department of the A. F. of L.?

A. They are the Unions we rely upon to supply our requirements in this State.

Q. Are there any other sources of manpower to supply these demands which you have described other than the affiliated unions of the Building Trades Department of the A. F. of L.?

Mr. Eagen: I object to that. I think that is far afield from any issue involved in this case.

Trial Examiner Ward: We have gone a little far afield on a number of occasions. He may answer. Let us make it brief along this line.

Mr. Gill: Yes.

A. The only other conceivable source would be the Washington State Employment Service and they, in turn, go to the Unions to get the men, so I can't say I know of any other manpower sources in this State.

* * *

Redirect Examination

By Mr. Robbins:

Q. Can you say that the reason a letter order was used in the instance of letter order Subcontract G-133 was because of the urgent need to commence work?

A. Housing was acute and it was a matter of prime concern to the Atomic Energy Commission to build residential structures to accommodate con-

(Testimony of James J. Molthan.)

struction people, the single men that they knew they were going to hire and also members of the Commission and General Electric residing at Richland. And on July 25th there were no plans drawn and the contractor went in, under cost-plus conditions, to perform such work as he would be directed to do—without plans, without specifications and with a rather dim knowledge on the part of all concerned as to what was going to be accomplished under the terms of the letter order.

That's why I say the estimate was $8,000,000, and we knew we were going to do residential type construction, and we were going to build a construction camp.

But we didn't even have plans to work on.

Q. Well, did Atkinson-Jones begin to man its job and start construction work to the extent of its ability immediately upon receipt of an executed letter order?

A. That was the purpose of giving us the letter order, to get us into performance as quickly as possible.

* * *

CHESTER R. HEWES

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. You are Chester R. Hewes? A. I am.

(Testimony of Chester R. Hewes.)

Q. And where do you reside?

A. Yakima.

Q. Were you ever in the employ of Guy F. Atkinson and J. A. Jones Construction Company?

A. I was.

Q. When did your employment begin there?

A. I believe it was around the 4th of November.

Q. Before going on your employment, did you make inquiries about being employed there?

A. I was down there the last part of October in '47, and I went into the personnel office.

There were a lot of men lined up at the door. I had to wait there a long time, and I asked them if they needed any machinists and they told me that—they referred me to the Operating Engineers at Pasco. They said it was a closed job—a closed shop.

Q. Now, who told you that?

A. Well, I can't recall who it was. It was a man who used to come out on the platform there and take the applicants inside.

Q. I do not mean the man's name, but was he a man connected with the employment department of Respondent? A. I imagine he was, yes.

Q. Then after you were told that, what did you do?

A. I went on down to Pasco to the Operating Engineers' office.

Q. Are you a member of any labor organization?

A. I.A.M., International Association of Machinists.

(Testimony of Chester R. Hewes.)

Q. How long have you been a member?

A. Oh, I imagine it's about 16 or 18 years.

Q. Were you a member of International Association of Machinists on or about the latter part of October, 1947? A. I was.

Q. Was anything said by you to the employment representative of the Respondent about your membership in the I.A.M.?

A. Well, it seems to me I did ask them if I could go to work there on my card, and they told me that the Operating Engineers had the contract and they referred me down to them at Pasco, or something to that effect.

Q. Was anything said to you to the effect that you could not be employed there without being referred to the Engineers?

A. He told me that the Operating Engineers had the contract.

Q. What did you do after you left the employment office? A. I went into Pasco.

Q. And where in Pasco did you go?

A. I went to the Labor Temple in Pasco, and there were some men in there and I couldn't get up to the door.

So I waited around there two or three hours and finally I contacted Mr. Clarke and I asked him if they needed any machinists, and they asked me right in ahead of a lot of men and they asked me if I was a machinist, and I showed my book.

Q. What book?

(Testimony of Chester R. Hewes.)

A. My machinists' book, International Association of Machinists dues book.

Q. O.K.

A. And he seemed to be satisfied I was a machinist. He asked me no further questions and he said that I would have to turn in my book in order to join the Operating Engineers to go on the job. And I told him I wouldn't do that.

He said—before that he told me that they would allow me 60% on my book, that is, I presume, the dues were $100 and they would allow me $60 for my book and I pay $40, which would entitle me to membership.

But I would not turn in my book, and I believe I came back home then.

And I went down again in a few more days—I don't remember how many more days—and I contacted him again and he——

Q. By "him," you mean who?

A. Mr. Clarke.

Q. Can you give us what position Mr. Clarke has with the Engineers?

A. He is the business agent, I presume.

Q. All right.

A. And he invited me in again and he—we talked it over and he wanted my book again. And I asked him why I couldn't go to work out there, being a machinist, and why I couldn't go to work on a permit.

Well, it seems like Ray seemed to think that

(Testimony of Chester R. Hewes.)

would be all right if he was running the show, but he wasn't running the show.

He talked to me like he believed in real unionism, and I thought quite a bit of him for that, but he was not running the show.

So he told me, "I will go you one better. You keep your book and we will charge you $40 and you go to work."

So he issued me a card of introduction, but I did not pay him the $40.

* * *

Q. During the time you were employed by Respondent, did you work in the 3,000 Area machine shop? A. I did.

Q. And for the sake of brevity, was the work you did there that which was described by Mr. McBurnie and Mr. Keck in their testimony?

A. I was doing machinist work in that shop.

Q. How long did you continue on the job with Respondent?

A. I left there on February the 19th, I believe.

Q. On February the 19th what happened?

A. About nine o'clock in the morning, on the 18th, the timekeeper came in and handed me a layoff card.

Q. I hand you what has been marked as General Counsel's Exhibit No. 10 and ask you if that is a photostat copy of the card handed to you at that time?

A. Well, it doesn't look like the same one. There is a photostatic copy of the original. I took it into

(Testimony of Chester R. Hewes.)

Pasco and had a photostatic copy made of it. The only difference I see is that Russell Gochnour signed this one.

Q. Yes.

A. It means the same thing, I guess.

Q. The lay-off card you received bears on its face all of the entries which appear on General Counsel's Exhibit 10 except that portion which is set out on General Counsel's 10 beginning with the word "reason." That portion does not appear on the card given to you, is that correct?

A. That's right.

Q. Otherwise, on the card delivered to you, the reason for discharge is marked as "Union request"? A. That's right.

Q. And the date is February the 19th, the same date? A. The same thing.

Q. No other reason was ever given to you for the discharge other than that which appears as the reason set out on General Counsel's Exhibit 10, is that correct?

A. None that I know of. It was a complete surprise to the superintendent, Mr. Keck. The timekeeper came right in the door and handed it to me. Mr. Keck knew nothing about it.

* * *

RAY CLARKE

a witness called by and on behalf of International Union of Operating Engineers, Local 370, A. F. of L., being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Gill:

Q. The Union security clauses of the current agreement require N.L.R.B. authorization in the procedure commonly referred to as Union shop elections, and I will ask you if Local 370 has taken any steps in connection with that matter?

A. We have,—definitely.

Q. And what steps, briefly?

A. We have completed our obligation required by that section in filing nine separate petitions for such elections.

Q. On work that comes under the Hewes Exhibit No. 1? A. That is right.

Q. Have you consulted with any regional official of the 19th Region with respect to the processing of those petitions? A. I have, by——

Q. You can answer yes or no.

A. Yes, I have.

Q. And have you been given any advice as to when they will conduct the elections?

A. I have.

Q. What was that advice?

A. I was told in a group meeting by Mr. McClas-

(Testimony of Ray Clarke.)

key that perhaps sometime next spring they might be processed.

Q. Did the gentleman indicate to you that in the spring of 1949, they would or would not conduct those elections?

A. He didn't give a definite answer.

Q. You understand by that that the decision would be made in the spring of 1949?

A. That is right.

Q. Whether it was to conduct the election or to refuse to conduct the election?

A. One way or the other, it is my understanding.

Q. Are you familiar with the conduct of the National Labor Relations Board with respect to processing petitions for bargaining rights at this Hanford Project? Yes or no. A. Yes, I am.

Mr Eagen: Before you answer, Mr. Clarke, I object very strenuously to this line of questioning on the ground that the National Labor Relations Board is the best judge of its own procedures and its own petitions and its own actions and doesn't need any testimony on that score; and, also, that the Counsel knows and the Trial Examiner knows that it is customary, has been since the inception of the Board not to process petitions when there are outstanding charges which exist in the instant situation.

Trial Examiner Ward: The Examiner was curious as to what Counsel was attempting to prove by this line of testimony.

(Testimony of Ray Clarke.)

Mr. Gill: It is within the allegation of the fifth affirmative defense, as to which the motion to strike was denied.

Trial Examiner Ward: I suggest on that point that you make an offer of proof. Instead of attempting to prove by this witness what the policy of the Board is, or might be, make an offer of proof.

Mr. Gill: I can save a great deal of time by proposing this solution to the matter, that the Trial Examiner reserve as an Exhibit, to be identified as Local 370's Exhibit No. 4, for the purpose of containing a statement from Mr. Walker or any of his associates briefly summarizing all of the N.L.R.B. applications which have been filed concerning this Hanford Project and the action, if any, taken by the N.L.R.B. in connection with any of those petitions.

Mr. Walker: May I make an observation, Mr. Examiner?

Trial Examiner Ward: You may.

Mr. Walker: In view of the line of examination that has come up, I do not intend on cross-examination to go into this matter concerning representation or go into the matter concerning union shop elections for the reason that those subject matters are entirely extraneous to this unfair labor practice procedure in the first place, and in the second place, I am not in a position to say that the Board has declined to process either Union shop petitions or representation positions upon the ground and for

(Testimony of Ray Clarke.)

the reason exclusively that the Board will not accept jurisdiction over the work covered by the Respondent herein. That is a question of fact. Secondly, as a question of law, I can—and I don't intend to make anything further of this—the question of law, the assertion of jurisdiction by the Board over contracting work is already covered by the Board's decision in the Ozark Dam case which is precisely factually the same as the construction work being done here.

Trial Examiner Ward: The record will show Counsel's observation.

Mr. Gill: I am sorry, I didn't hear you.

Trial Examiner Ward: I say, the record will show the observation of Counsel.

Mr. Gill: Well, I would like to have a ruling as to whether such exhibits may be reserved for the purposes indicated.

Trial Examiner Ward: I beg your pardon?

Mr. Gill: I would like to have your ruling, Mr. Examiner, as to whether you will reserve Local 370's Exhibit No. 4 for the purpose of reciting the history of these petitions,—a very brief statement.

Trial Examiner Ward: For the purpose of reciting them?

Mr. Gill: Yes.

Mr. Walker: Well, just one moment. So that you will understand my position clearly, and if you feel the need for going into it on examination here and now, I think you should do so, but understand me, if you reserve that and attempt to prepare a

(Testimony of Ray Clarke.)

document after the close of this and expect me to join in on it, which document you are attempting to use to show that the Board has declined to assert jurisdiction over construction work, I tell you now that I will not join in it.

Mr. Gill: No; the purpose of the exhibit is to show, as I have already indicated, the N.L.R.B. petitions for the representation and for union shop that have been filed with the 19th Region covering the Hanford Project and the action, if any, that the Board has taken with respect thereto.

Mr. Walker: Then I object to it upon the ground that it is incompetent, irrelevant and immaterial. What has been filed with respect to Union security matters or with respect to representation matters is entirely extraneous to the issues presented in this unfair labor practice proceeding.

Trial Examiner Ward: Are you making this in the form of an objection?

Mr. Walker: I do, sir.

Trial Examiner Ward: I am going to sustain that. Make an offer of proof.

Mr. Gill: Very well, I will make an offer of proof by this witness and other witnesses who are not in attendance here that if they were permitted to testify they would state that on numerous occasions Local Unions——

Mr. Eagen: What local union? Local 370, you mean?

Mr. Gill: Local Unions who have supplied members on the Hanford Project and Unions which have

(Testimony of Ray Clarke.)

been designated as exclusive bargaining agencies by employees on the Hanford Project.

These Unions have filed numerous petitions for bargaining rights with the 19th Region of the N.L.R.B. on numerous and separate occasions and that no action was taken by the N.L.R.B. with respect to said petitions except to state that the said matters had been referred to Washington, D. C., and thereafter, in response to inquiry, further responses, that nothing further had been heard and that there were numerous repeated requests for knowledge as to what action had been taken, with the further advice that the matters had been referred to Washington, D. C., and that there had been no further instructions with respect to the N.L.R.B. conducting any of those hearings and elections necessary to determine representation questions; that that policy of the N.L.R.B. has been in existence at all times since the Hanford project has been in existence and that recently that policy has been applied to U. A. petitions with this modification, that the recent advice has been that Washington, D. C., will make a decision probably in the spring of 1949, but that it is not known what the decision will be, as to whether any union shop elections will be conducted or not.

That is my offer of proof.

Trial Examiner Ward: The record will show the offer. The ruling remains the same.

* * *

Q. Did you know the customs and practices in the building and construction trades industry in the

(Testimony of Ray Clarke.)

area covered by your Union as it was described by Mr. Hibberd, the geographical area with respect to the execution of a labor agreement covering wages, hours and working conditions in advance of the beginning of the construction work? Answer that yes or no.

A. Yes. I can elaborate, if necessary.

Q. What is the custom?

A. Well, for instance, it is now November 4th or 5th and we have already signed and sealed our labor agreement with the Associated General Contractors for the calendar year 1949, not knowing just what jobs will be covered by it.

Q. Now, has that also been true with respect to preceding contracts with the A.G.C.?

A. That is correct.

* * *

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GUY F. ATKINSON CO., and J. A. JONES CONSTRUCTION CO.,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board—Series 5, as amended (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceeding had before said Board, entitled, "In the Matter of Guy F. Atkinson Co., a corporation, and J. A. Jones Construction Co., a corporation d/b/a Guy F. Atkinson Co. and J. A. Jones Construction Co. and Chester R. Hewes, Case No. 19-CA-28," before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Peter F. Ward, Trial

Examiner, for the National Labor Relations Board, dated November 4, 1948.

(2) Stenographic transcript of testimony taken before Trial Examiner Ward on November 4 and 5, 1948, together with all exhibits introduced in evidence.

(3) Respondent's letter, dated November 10, 1948, requesting extension of time for filing brief before the Trial Examiner.

(4) Copy of Chief Trial Examiner's telegram, dated November 17, 1948, granting all parties extension of time for filing briefs.

(5) Copy of Trial Examiner Ward's Intermediate Report, dated May 12, 1949, (annexed to item 22 hereof); order transferring case to the Board, dated May 12, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(6) Respondent's letter, dated May 24, 1949, requesting extension of time for filing exceptions.

(7) Letter from International Union of Operating Engineers, Local 370, hereafter called Union, dated May 24, 1949, requesting extension of time for filing exceptions and brief.

(8) Copy of Board's telegram, dated May 27, 1949, granting all parties extension of time for filing exceptions.

(9) Copy of Board's letter to Union, dated May 31, 1949, noting grant of extension of time for filing exceptions and briefs and denying request for further extension, together with affidavit of service

and United States Post Office return receipt thereof.

(10) Union's letter, dated June 2, 1949, requesting permission to argue orally before the Board.

(11) Respondent's letter, dated June 7, 1949, requesting permission to argue orally before the Board.

(12) Respondent's letter, dated June 23, 1949, requesting permission to submit supplementary exceptions.

(13) Copy of Respondent's exceptions to the Intermediate Report, received June 27, 1949.

(14) Copy of Union's exceptions to the Intermediate Report, received June 27, 1949.

(15) Copy of Board's telegram to Respondent, dated July 13, 1949, granting permission to file supplemental exceptions, together with copy of Board's letter to Respondent, dated July 15, 1949, to the same effect.

(16) Union's telegram, dated July 25, 1949, requesting extension of time and permission to argue orally before the Board.

(17) Copy of Respondent's supplemental exceptions, received July 26, 1949.

(18) Notice of hearing for the purpose of oral argument, issued by the Board on July 29, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(19) Letter from International Union of Operating Engineers, dated August 5, 1949, requesting postponement of date of public hearing.

(20) Copy of Board's telegram, dated August 5,

1949, notifying all parties of postponement of oral argument.

(21) Notice of hearing for the purpose of oral argument, issued by the Board on December 5, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(22) List of appearances at oral argument, dated December 19, 1949.

(23) Copy of Decision and Order issued by the National Labor Relations Board on June 8, 1950, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

(24) Respondent's motion for reconsideration of Decision and Order, received July 7, 1950.

(25) Union's petition for reconsideration of Decision and Order and for reopening the record, received July 19, 1950.

(26) Reply of Charging Party, Chester R. Hewes, in resistance to the two motions for reconsideration of Decision and Order, received August 10, 1950.

(27) Order denying Respondent's motion and Union's petition, issued by the Board on August 25, 1950, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor

Relations Board in the city of Washington, District of Columbia, this 13th day of March, 1951.

[Seal] NATIONAL LABOR
RELATIONS BOARD,

/s/ FRANK M. KLEILER,
Executive Secretary.

[Endorsed]: No. 12880. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Guy F. Atkinson Co., and J. A. Jones Construction Co., Respondent. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed March 19, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12880

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GUY F. ATKINSON CO., and J. A. JONES CONSTRUCTION CO.,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. III, Secs. 151 et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Guy F. Atkinson Co., and J. A. Jones Construction Co., and its officers, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Guy F. Atkinson Co., a corporation, and J. A. Jones Construction Co., a corporation, d/b/a Guy F. Atkinson Co., and J. A. Jones Construction Co. and Chester R. Hewes, Case No. 19-CA-28."

In support of this petition the Board respectfully shows:

(1) Respondent is a joint venture, composed of two corporations, engaged in business in the State of Washington, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on June 8, 1950, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, and its officers, successors, and assigns. The aforesaid order provides as follows:

Order

Upon the entire record in the case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Guy F. Atkinson Co. and J. A. Jones Construction Co., and its officers, successors, and assigns shall:

1. Cease and desist from:

(a) Recognizing International Union of Operating Engineers, Local 370, A.F.L., or any successor thereto, as the representative of any of its employees for the purposes of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other

conditions of employment unless and until said organization shall have been certified by the National Labor Relations Board;

(b) Performing or giving effect to its contract of August 16, 1947, with International Union of Operating Engineers, Local 370, A.F.L., or to any modification, extension, supplement, or renewal thereof or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board; excepting, however, that in no event shall this be construed as waiving any provisions of Sections 8 and 9 of the Act, as amended;

(c) Discouraging membership in International Association of Machinists or in any other labor organization of its employees or encouraging membership in International Union of Operating Engineers, Local 370, A.F.L., by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment;

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in

concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Chester R. Hewes immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges;

(b) Make whole Chester R. Hewes for any loss of pay he may have suffered as a result of the Respondent's discrimination against him by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of the Respondent's offer of reinstatement, less his net earnings during said period;

(c) Post at its plant in Richland, Washington, copies of the notice attached hereto, marked Appendix A.[16] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's

[16]In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted in the Notice, before the words "A Decision and Order," the words "A Decree of the United States Court of Appeals Enforcing."

representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

(3) On June 8, 1950, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforc-

ing in whole said order of the Board, and requiring Respondent, and its officers, successors, and assigns, to comply therewith.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 13th day of March, 1951.

Appendix A

Notice to All Employees Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will withdraw and withhold all recognition from International Union of Operating Engineers, Local 370, A.F.L., as representative of any of our employees at our Richland, Washington, plant, for the purposes of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board as the representative of such employees.

We Will cease performing or giving effect to our contract of August 16, 1947, with International Union of Operating Engineers, Local

370, A.F.L., covering employees at our Richland, Washington, plant, or to any modification, extension, supplement, or renewal thereof, or to any other agreement contract, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the Board, excepting, however, that in no event shall this be construed as waiving any provisions of Sections 8 and 9 of the Act as amended.

We Will Not in any like or related matter interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

We Will offer to Chester R. Hewes immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed; and we will make

him whole for any loss of pay suffered as a result of the discrimination against him.

GUY F. ATKINSON AND J. A. JONES CONSTRUCTION CO.,
Employer.

Dated.....

By,
Representative. Title.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed March 17, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY THE BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, the petitioner herein, and, in conformity with the rules of this Court, files this statement of points upon which it intends to rely in the above-entitled proceeding:

1. The Board properly determined that respondent's operations affected commerce within the meaning of the Act and that rspondent therefore was subject to the jurisdiction of the Board.

2. The Board properly found that respondent by discharging employee Chester R. Hewes violated Section 8(a)(3) and (1) of the Act.

3. The Board properly found that respondent in violation of Section 8(a)(1) of the Act rendered illegal assistance to Local 370, International Union of Operating Engineers, A.F.L.

4. The Board's order is valid and proper.

Dated at Washington, D. C., this 13th day of March, 1951.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

[Endorsed]: Filed March 17, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF NATIONAL LABOR RELATIONS BOARD WITH RESPECT TO PETITION FOR ENFORCEMENT OF ITS ORDER AGAINST RESPONDENT

The National Labor Relations Board, petitioner herein, files this statement in connection with its petition herein for enforcement of its order issued against respondent.

1. Paragraphs 1(a) and (b) of the Board's order, as more fully set forth in the Board's petition provide that respondent cease and desist from recognizing International Union of Operating En-

gineers, Local 370, A.F.L., as the representative of any of its employees for collective bargaining purposes, and from giving effect to a contract dated August 16, 1947, between respondent and said union, or any modifications or renewal thereof, unless or until said International Union of Operating Engineers, Local 370, A.F.L., shall have been certified by the Board.

2. On September 19, 1950, after the issuance of the order referred to above, the Board in proceedings identified on the Board's records as Matter of Guy F. Atkinson Company and J. A. Jones Construction Company, d/b/a Atkinson-Jones Construction Company, and International Union of Operating Engineers, Local No. 370, A. F. of L., Case No. 19-RC-646, duly certified said International Union of Operating Engineers, Local 370, A.F.L., as the collective bargaining representative of:

> All employees at the Hanford Works, of Guy F. Atkinson Company and J. A. Jones Construction Company, d/b/a Atkinson-Jones Construction Company, North Richland, Washington, who are engaged in supervising, controlling, dismantling, erecting, operating, repairing and maintaining all hoisting and portable machines and construction machinery and equipment, within the recognized craft jurisdiction of the International Union of Operating Engineers, excluding supervisory, clerical, plant protection and professional employees of the employer and all employees regularly work-

ing at the employer's "White Bluffs Machine Shop," and all other employees of the employer, * * *

3. Said certification satisfies the condition set forth in paragraphs 1(a) and (b) of the Board's order herein insofar as the order applies to the employees covered by said certification and the order is therefore no longer a bar to respondent's engaging in collective bargaining with said union as the bargaining representative of the employees covered by said certification.

4. Paragraphs 1(a) and (b) of the Board's order continue to be operative insofar as they enjoin respondent from recognizing said union as the collective bargaining representative of any employees of respondent, other than those covered by said certification, until or unless the Board certifies the union as their bargaining representative.

5. Under established procedures, the Board's order normally is entitled to judicial enforcement, without regard to intervening circumstances, since an enforcement decree speaks as of the date of the issuance of the order. However, to avoid misunderstanding, particularly among the employees in question, it is appropriate, and the Board hereby consents thereto, that the enforcement decree prayed for in its petition and the notice be posted recite that the condition stated in paragraphs 1(a) and (b) has been met with respect to the employees covered by the certification referred to above.

The Board prays this Honorable Court that it

cause notice of the filing of this statement to be served upon Respondent.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 22nd day of March, 1951.

[Endorsed]: Filed March 26, 1951.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America
To: International Union of Operating Engineers, Local 370, Att.: Mr. L. Presley Gill, 2800 First Avenue, Seattle, Washington.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 19th day of March, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on June 8, 1950, in a proceeding known upon the records of the said Board as

"In the Matter of Guy F. Atkinson Co., a

corporation, and J. A. Jones Construction Co., a corporation, doing business as Guy F. Atkinson Co., and J. A. Jones Construction Co., and Chester R. Hewes, Case No. 19-CA-28,"

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 19th day of March, in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Return on Service of Writ attached.

Received March 23, 1951.

U. S. Marshal's Civil Docket No. 21787.

[Endorsed]: Filed March 30, 1951.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To: Guy A. Atkinson Co., a corporation, and J. A. Jones Construction Co., a corporation, d/b/a Guy F. Atkinson Co. and J. A. Jones Construction Co., Richland, Wash., and International Union of Operating Engineers, Local 370, A.F.L., Att.: Mr. William C. Robbins, 325 South Browne Street, Spokane, Washington.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 19th day of March, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on June 8, 1950, in a proceeding known upon the records of the said Board as

> "In the Matter of Guy F. Atkinson Co., a corporation, and J. A. Jones Construction Co., a corporation, doing business as Guy F. Atkinson Co., and J. A. Jones Construction Co., and Chester R. Hewes, Case No. 19-CA-28,"

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 19th day of March, in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Returns on Service of Writ attached.

[Endorsed]: Filed April 4, 1951.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To: National Association of Home Builders, Att.: Mr. William J. Tobin, 1028 Connecticut Avenue, N.W., Washington, D. C.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each

of you are hereby notified that on the 19th day of March, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on June 8, 1950, in a proceeding known upon the records of the said Board as

> "In the Matter of Guy F. Atkinson Co., a corporation, and J. A. Jones Construction Co., a corporation, doing business as Guy F. Atkinson Co. and J. A. Jones Construction Co., and Chester R. Hewes, Case No. 19-CA-28."

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 19th day of March, in the year of our Lord one thousand, nine hundred and fifty-one.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Return on Service of Writ attached.

[Endorsed]: Filed April 5, 1951.

[Title of Court of Appeals and Cause.]

ANSWER OF ENGINEERS LOCAL No. 370 TO PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR ENFORCEMENT OF ITS ORDER

To: the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit.

Comes now International Union of Operating Engineers, Local No. 370, Party to the Contract in the above-entitled proceedings, and as its answer and response to the petition for enforcement of the order of the National Labor Relations Board, admits, denies and alleges as follows:

I.

Upon information and belief, Engineers Local No. 370 admits the allegations contained in Paragraphs (1), (2), (3) and (4) of the petition.

II.

Engineers Local No. 370 denies that the Board properly found that the Respondent, by discharging Chester R. Hewes at the request of Engineers Local No. 370 violated Sections 8 (a) (3) and (1) of the amended National Labor Relations Act. Further Engineers Local No. 370 denies that the Board found properly that the Respondent rendered illegal assistance to Engineers Local No. 370 in violation of Section 8 (a) (1) of the amended Act.

Specifically and without limitation of the foregoing general denials, Engineers Local No. 370

asserts and alleges that the Board erred in finding that the Hanford Works collective bargaining agreement of August 16, 1947, which provided for closed shop form of union security, was not valid defense to the discharge of Chester R. Hewes for the following reasons:

(A) In the language of the relevant part of the proviso of Section 8 (3) of the orginal Act, an employer was authorized to enter into a "closed shop" collective bargaining agreement with a labor organization

> "if such labor organization is the representative of the employees as provided in Section 9 (a) in the appropriate bargaining unit covered by such agreement when made."

Historically and at all times during the year 1947 and until the present time, Engineers Local No. 370 had established an area-wide collective bargaining pattern through written agreements with the Associated General Contractors of America covering the entire State of Washington east of the 120th meridian and northern Idaho. The aforesaid agreements including the Associated General Contractors agreement of 1947, were approved by referendum ballot by the majority of the members of Engineers Local No. 370. The Board, therefore, erred in finding and concluding that the collective bargaining agreement of August 16, 1947, was not within the protection afforded by the priviso to Section 8 (3) of the original National Labor Relations Act.

(B) The Board's policy of non-assertion of jurisdiction over the building and construction in-

dustry at the time the collective bargaining agreement of August 16, 1947, was executed did not permit a determination of the fact that a collective bargaining unit was or was not appropriate within the purview of the priviso of Section 8 (a) (3) of the National Labor Relations Act. Therefore, although the statute provided facilities for a proper unit determination, the administrative policy of the National Labor Relations Board negated the possibility of recourse to the statutory remedy by Engineers Local No. 370 or any other labor organization or employers in the industry seeking a similar determination. The Board improperly found the collective bargaining agreement of August 16, 1947, invalid for the reason that the unit was inappropriate, while at the same time its policy denied Engineers Local No. 370 and/or Respondent the means of making a proper unit determination.

III.

Engineers Local No. 370 denies that the Board's order is valid or proper.

Further and without limitation of the foregoing, Engineers Local No. 370 alleges that the Board's order is arbitrary, capricious, contrary to law, and works inequity to Engineers Local No. 370 and Respondent as well as other labor organizations and employers in the construction industry, who may be similarly situated, for the following reasons:

(A) At the time of the execution of the collective bargaining agreement of August 16, 1947, and at the time of the discharge of Chester R. Hewes on February 19, 1948, and at the time the Order

was issued, the Board, as a matter of administrative policy, continued to refuse to assert jurisdiction over the building and construction industry. The statutory provisions of the Act authorizing the Board to hold elections were invoked by Engineers Local No. 370 during the calendar year 1948, and no action on several petitions placed before it was taken by the Board by reason of its continued refusal to assert jurisdiction over the construction industry. The Board's order, therefore, gives retroactive effect to its change in administrative policy so as to nullify rights and obligations which had matured while the original administrative policy of non-assertion of jurisdiction was still in effect. To this extent the Board's order represents a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States, and further, does violence and is contrary to the intent of Congress.

Wherefore, Engineers Local No. 370 prays the Court to set aside the Board's order and dismiss its petition for enforcement.

Dated: May 4, 1951.

/s/ WILLIAM C. ROBBINS,
Attorney for Local No. 370, International Union of Operating Engineers.

Affidavits of Service by Mail attached.

[Endorsed]: Filed May 7, 1951.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENT TO PETITION AND STATEMENT OF POINTS RELIED UPON BY THE BOARD

To: the Honorable, Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Guy F. Atkinson Co. and J. A. Jones Construction Co., Respondent in the above-entitled proceedings and as its answer and response to the petition for enforcement and to the statement of points relied upon by the National Labor Relations Board, admits, denies and alleges as follows:

I.

Answering paragraph (1) of said petition, Respondent admits that it is a joint venture, composed of two corporations engaged in business in the State of Washington, within this judicial circuit. It denies that it has committed any unfair labor practices within this judicial circuit, or elsewhere.

II.

Respondent admits the allegations contained in paragraphs (2), (3) and (4) of said petition.

III.

Answering paragraphs 2 and 3 of the statement of points relied upon by the Board, Respondent denies that the Board properly found that Respondent, by discharging Chester R. Hewes, violated Section 8

(a) (3) and (1) of the National Labor Relations Act. Respondent further denies that the Board properly found that Respondent, in violation of Section 8 (a) (1) of the Act, rendered illegal assistance to Local 370, International Union of Operating Engineers, A.F.L.

In this connection, and without limiting the generality of the foregoing denials, Respondent alleges that the Board erred in finding and concluding that the closed-shop contract of August 16, 1947, between the Respondent and Local 370, International Union of Operating Engineers, A.F.L. (and various other unions affiliated with the Building and Construction Trades Department A.F.L.), was not a valid defense to the discharge of Chester R. Hewes, for the following reasons:

(a) Said finding and conclusion is not supported by substantial evidence upon the record considered as a whole.

(b) Said contract was made in good faith with the authorized and recognized collective bargaining representatives of the members of the various building and construction crafts included under the contract in the respective appropriate collective bargaining units covered by such contract when made. Therefore, said contract was within the protection of the priviso to Section 8 (3) of the orginal National Labor Relations Act.

(c) Said contract was made in good faith by a joint venture composed of members of the Associated General Contractors of America, Inc., with the authorized and recognized collective bargaining

representative of all Operating Engineers employed by members of the Associated General Contractors of America, Inc., within the Eastern Washington and Northern Idaho Territory, in which the work covered by the contract was located. The closed-shop provisions of the contract were supplemental to and in confirmation of the closed-shop provisions of an existing area agreement between the Spokane Chapter of the Associated General Contractors of America, Inc., and Local 370 of the International Union of Operating Engineers, A.F.L., dated February 28, 1947, covering all work performed by Operating Engineers within said territory. Therefore, said contract, was within the protection of the priviso to Section 8(3) of the original National Labor Relations Act.

(d) The fact that at the time when said contract was made the Board was refusing to assert jurisdiction over the construction industry and was denying to the parties the statutory facilities for determining the appropriateness of the units involved makes erroneous and improper a finding that the contract was invalid because the units covered were inappropriate.

IV.

Answering paragraph 4 of the statement of points relied upon by the Board, Respondent denies that the Board's order is either valid or proper.

In this connection, and without limiting the generality of the foregoing denial, Respondent alleges that said order is arbitrary, capricious and contrary to law for the following reasons:

(a) Said order attempts to give retroactive application to a change in administrative policy. In the exericse of its discretionary authority so to do, the Board elected not to assert jurisdiction over the construction industry under the original National Labor Relations Act. The execution of the contract of August 16, 1947, and the discharge of Chester R. Hewes on February 19, 1948, took place while this original administrative policy was still in effect. The retroactive application of the Board's change in this policy of abstention in such a way as to nullify rights acquired and obligations assumed in reliance upon the original policy is contrary to the intent of Congress and is a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

(b) Said order was issued at a time when the Board was continuing to refuse to entertain petitions for certification and union-shop elections in the construction industry. The enforcement of the unfair labor practice provisions of the National Labor Relations Act against employers and unions who have been denied the benefit of the election provisions of the Act is contrary to the intent of Congress, and a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

(c) For the reason alleged in subparagraphs (a) and (b) of this paragraph IV, the Board was and is estopped to order and direct Respondent to take the action specified in such order.

(d) For the reasons alleged in subparagraphs (a) and (b) of this paragraph IV, and for the further reason that the Board found that Respondent had acted in good faith in discharging Chester R. Hewes, such portion of said order as directs Respondent to pay back wages to said Chester R. Hewes is invalid and improper.

(e) For the reasons alleged in subparagraphs (a), (b) and (d) of this paragraph IV, and for the further reason that Chester R. Hewes would have been rehired upon application to Respondent after the closed-shop contract of August 16, 1947, was superseded by an open-shop contract effective August 10, 1948, such portion of said order as directs Respondent to pay back wages to said Chester R. Hewes for any period after August 10, 1948, is invalid and improper.

V.

Answering the statement of the Board, dated March 22, 1951, with respect to its petition, Respondent alleges that in proceedings before the Board in Case No. 19-UA-2259, the International Union of Operating Engineers, Local 370, A.F.L., was authorized by the employees in the bargaining unit certified in Case No. 19-RC-646, to execute a union-shop agreement with Respondent covering such unit. Therefore, the provisions of paragraph 1 (c) of the Board's order are inappropriate insofar as such order applies to the employees covered by said certification.

Wherefore, Respondent prays that the Court set

aside the Board's order and dismiss its petition for enforcement.

Dated: May 7, 1951.

GARDINER JOHNSON,
THOMAS E. STANTON, JR.

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Respondent, Guy F. Atkinson Co. and J. A. Jones Construction Co.

Affidivats of Service by Mail attached.

[Endorsed]: Filed May 7, 1951.

No. 12880

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GUY F. ATKINSON CO., A CORPORATION, AND J. A. JONES CONSTRUCTION CO., A CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Court of Appeals for the Ninth Circuit

No. 12880

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GUY F. ATKINSON CO., A CORPORATION, AND J. A. JONES CONSTRUCTION CO., A CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondent on June 8, 1950, pursuant to Section 10 (c) of the National Labor Relations Act, as amended.[1] The Board's decision and order (R. 47–103) are reported in 90 N. L. R. B. No. 27. This Court has jurisdiction under Section

[1] The National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*), herein called the Act, was amended by Section 101 of Title I of the Labor Management Relations Act, effective August 22, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, Sec. 151, *et seq.*). Relevant portions of the original and amended Acts appear in the Appendix, *infra*, pp. 22–26.

10 (e) of the Act, as amended, because the unfair labor practice in question occurred within this judicial circuit in the course of respondent's operations in the vicinity of Richland, Washington.

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law [2]

Briefly, the Board found that respondent violated Section 8 (a) (3) and (1) of the Act by discharging Employee Chester R. Hewes pursuant to a closed shop contract executed by respondent and Local 370, International Union of Operating Engineers, AFL (hereinafter called the Operating Engineers) which did not satisfy the requirements of the operative exculpatory proviso to Section 8 (3) of the original Act [3] (R. 50–54, 83–85, 88). The Board also found that respondent in violation of Section 8 (a) (1) of the Act rendered illegal assistance to the Operating Engineers (R. 54, n. 14, 92).

The facts as found by the Board, and as shown by the evidence, may be summarized as follows: [4]

[2] The Board adopted the findings, conclusions, and recommendations of the Trial Examiner with certain additions and modifications (R. 48–54).

[3] The ban on closed-shop contracts effected by Section 8 (a) (3) of the amended Act is not applicable to this contract, which was executed before August 22, 1947, the effective date of the amendments to the Act, and therefore, if valid under the proviso to Section 8 (3) of the original Act, would come under the saving terms of Section 102 of the amended Act (*infra*, p. 26).

[4] In the following statement record references preceding the semicolon, if one appears, are to the Board's findings; succeeding references are to the supporting evidence.

A. Respondent's operations

Guy F. Atkinson Co. and Jones Construction Co. (collectively called respondent) are engaged in a joint venture to construct buildings, facilities and other items in connection with the Hanford Engineering Works Project of the United States Atomic Energy Commission (R. 66–67, 67–68; 7, 13, 139–140, 180). The work was undertaken pursuant to an agreement made by respondent on July 25, 1947, with the General Electric Company, the prime contractor on the project (R. 66; 7, 13, 140). The total cost of the construction work undertaken by respondent was estimated at $8,000,000 (R. 68–69; 180, 188, 192). Respondent's principal place of business is located at Richland, Washington (R. 66; 7, 13, 140). In the course of its business operations, respondent, during the period from July 29, 1947, to April 6, 1948, purchased approximately $20,000,000 worth of construction materials, equipment, and supplies for delivery at Richland (R. 66; 8, 13, 140). Approximately $2,500,000 worth of these articles were transported to respondent from points outside the State of Washington (R. 66; 8, 13, 140). In addition, approximately $9,500,000 worth of these articles were produced in other states and thereafter were transshipped to respondent from points within the State of Washington (R. 67; 8, 13, 140–141).

Upon these facts, the Board found (R. 48–49, 67) that respondent's operations affect commerce within the meaning of the Act and also that in view of the magnitude of respondent's operations and their substantial effect upon interstate commerce, it would ef-

fectuate the policies of the Act for the Board to exercise jurisdiction in this case.

B. The unfair labor practices

1. *The closed-shop contract between respondent and the Operating Engineers*

On August 16, 1947, respondent and numerous affiliates of the Building and Construction Trades Council, AFL, including the Operating Engineers, executed a closed-shop contract, effective as of August 1, 1947, for a period of one year and thereafter from year to year unless terminated by timely notice[5] (R. 50, 69; 9, 13, 147–160, 176). The contract, among other things, provided that its terms were to cover all employees who were members of the signatory unions and that the respective signatory unions were to be recognized as the sole and exclusive bargaining agent of the employees in the respective crafts (R. 69; 148–149). The contract further provided that respondent retain in its employment only members of the respective unions in good standing or those who signified their intention of becoming members and that respondent upon notice from the appropriate union release from employment any employee who failed to maintain in good standing his membership in the union or defaulted in his obligations to the union (R. 9, 13, 69–70; 149–150).

The construction project, which respondent had undertaken and which was known to be a very extensive one, was in its early stages when the above contract

[5] This contract was superseded by an open-shop contract on August 10, 1948 (R. 163–172, 173, 182–184).

was executed (R. 51, 70; 180, 185–186, 188–189). At that time respondent had in its employ a skeleton working force of only 125 construction workers, including 10 operating engineers (R. 51–52; 145, 146, 179). By December 31, 1947, a little over four months after the closed-shop contract was executed, respondent's work force had expanded to 5400 construction workers, including 740 operating engineers (R. 52; 145, 146).

2. *The discharge of Hewes at the request of the Operating Engineers*

In October 1947, Hewes, a member of the International Association of Machinists, herein called the Machinists, applied for work as a machinist at respondent's personnel office (R. 70–71; 174, 193–194). He was told that closed-shop conditions prevailed and was referred to the office of the Operating Engineers at Pasco, Washington (R. 71; 193, 194). Hewes reported to the Pasco office where the union's business manager, Ray Clarke, informed him that in order to obtain work on the project, he would have to relinquish his membership in the Machinists, by surrendering his Machinists' dues book and apply for membership in the Operating Engineers (R. 71; 193, 194–195). Hewes refused to do so (R. 71; 195). He later returned to Clarke's office and after further discussion Clarke issued to him a so-called introduction card assigning him to work with respondent as a machinist (R. 71–72; 195–196). Hewes was permitted to retain his Ma-

chinists' dues book but was required to apply for membership in the Operating Engineers (R. 72; 196). Hewes also agreed to pay an initiation fee of $40 (*ibid.*). Hewes reported for work at the project on or about November 4, 1947, and was assigned to work in a machine shop (R. 72; 174, 193, 196).

On February 16, 1948, the Operating Engineers requested respondent to remove Hewes from the project because Hewes had "absolutely failed in his financial obligation to this Local Union" (R. 72–75; 162, 177). Two days later, after having satisfied itself that the discharge of Hewes was required under its contract with the Operating Engineers, respondent terminated Hewes' employment (R. 75; 143, 161, 177–179, 196–197).

3. *The Board's conclusions as to the discharge of Hewes and illegal assistance rendered to the Operating Engineers*

Upon the foregoing facts, the Board concluded (R. 53–54, 88) that the contract between respondent and the Operating Engineers was not a valid closed-shop contract under the governing proviso to Section 8 (3) of the original Act and therefore it afforded to respondent no defense to the otherwise discriminatory discharge of Hewes. The trial examiner reached that conclusion on the ground that, as he found (R. 83), the record contained no showing that when the contract was executed the union represented any of respondent's employees in the unit covered by the contract and therefore the contract did not come within the exemption

contained in the proviso to Section 8 (3). The Board found it unnecessary to determine whether or not the union represented any of respondent's employees on the date the contract was executed. The Board concluded, however, that since the contract was executed at a time when respondent's working force was not at all representative of that shortly to be employed and to be covered by the contract, the Operating Engineers could not have been, as required by the proviso to Section 8 (3), the representative designated by a majority of the employees in the bargaining unit and the contract was therefore invalid (R. 52, 84; 179–181). Accordingly, the Board found (R. 54, 88) that respondent's discharge of Hewes pursuant to the contract was violative of Section 8 (a) (3) and 8 (a) (1) of the amended Act.

The Board further found (R. 54, n. 14, 92) that respondent rendered illegal assistance to the Operating Engineers in violation of Section 8 (a) (1) of the Act by recognizing the union as the exclusive bargaining representative of its operating engineers although a majority thereof had not so designated the union, by requiring its employees to become and remain members of the union, thereby enhancing its prestige, and by discharging Hewes, thereby enforcing its illegal recognition of the Operating Engineers.

II. The Board's order

The Board's order (R. 55–60) requires respondent to cease and desist from recognizing the Operating Engineers as the representative of any of its em-

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ployees and from performining or giving effect to any contract with the Operating Engineers, unless and until the Operating Engineers shall have been certified by the Board; discouraging membership in the Machinists and encouraging membership in the Operating Engineers by discriminating against any of its employees, and from in any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights under the Act. It further requires respondent to offer Hewes reinstatement with back pay, and to post appropriate notices.

III. Questions presented

1. Whether the Board properly found that respondent discriminatorily discharged employee Hewes in violation of Section 8 (a) (3) and (1) of the Act.

2. Whether the Board properly found that respondent rendered illegal assistance to the Operating Engineers in violation of Section 8 (a) (1) of the Act.

3. Whether the Board's order is proper and valid.

SUMMARY OF ARGUMENT

I. The Board properly found that respondent discriminatorily discharged Employee Hewes in violation of Section 8 (a) (3) and (1) of the Act. The closed shop agreement between respondent and the Operating Engineers does not afford a defense to that discharge. The agreement was executed at a time when the number of employees in the bargaining unit was not, because of respondent's expanding operations, representative of respondent's anticipated work force. The agreement under established policies

of the Board therefore fails to satisfy the requirement of the controlling proviso to Section 8 (3) of the original Act because the union was not the bargaining representative designated by a majority of the employees in the collective bargaining unit.

II. The Board properly found that respondent rendered assistance to the Operating Engineers in violation of Section 8 (a) (1) of the Act. The recognition of the union as the exclusive bargaining representative of the employees in question and the enforcement of the closed shop agreement, although the union had not been designated the statutory representative by a majority of the employees, was in derogation of the rights of employees to bargain collectively through representatives of their own choosing and impaired their freedom in the exercise of the rights guaranteed by the Act.

III. The Board's order is proper and valid.

ARGUMENT

POINT I

The Board properly found that respondent discriminatorily discharged Employee Hewes in violation of Section 8 (a) (3) and (1) of the Act

Respondent's discharge of Hewes because of his nonmembership in the Operating Engineers is an elementary violation of Section 8 (a) (3) and (1) of the Act unless the closed-shop contract between the union and respondent, pursuant to which it was made, was valid under the controlling proviso to Section 8 (3) of the original Act. *N. L. R. B.* v.

Electric Vacuum Cleaner Company, 315 U. S. 685, 694; *N. L. R. B.* v. *Cowell Portland Cement Co.,* 148 F. 2d, 237, 242–243 (C. A. 9), certiorari denied, 326 U. S. 735. The issue, therefore, is whether the Board properly found that the agreement failed to satisfy the requirements of the proviso.

Section 8 (3) of the original Act, like Section 8 (a) (3) in the amended Act, made it unlawful for an employer to discriminate against employees by reason of their membership or nonmembership in a union. The proviso to Section 8 (3) of the original Act, however, exempted from the prohibition of the Section any such action taken by the employer pursuant to a closed-shop contract executed in conformity with the requirements of the proviso. That proviso declared,

> * * * nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment, membership therein, if such labor organization is the representative of the employees, as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

Section 9 (a) provides that—

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive rep-

> resentatives of all the employees in such unit for the purposes of collective bargaining * * *

The Act in Section 9 thus adopts "the principle of majority rule * * * a rule that 'is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.' S. Rep. No. 573, 74th Cong., 1st Sess. p. 13." *N. L. R. B.* v. *A. J. Tower Co.,* 329 U. S. 324, 331. Section 7 of the Act also guarantees to employees the right "to bargain collectively through representatives of their own choosing." And Section 9 (b) of the Act imposes upon the Board the duty "to assure to employees the fullest freedom" in selecting representatives of their own choosing. Within this framework, "Congress has entrusted the Board with a wide degree of discretion" to establish policies and procedures and to make "practical adjustments" designed to afford to employees the fullest freedom in their choice of bargaining representatives and to insure that the choice of representatives reflects "the will of the majority of the electorate." *Tower* case, *supra.*[6]

[6] The Senate Committee, which reported on the amendments to the original Act, adopted in the amended Act, has stated (S. Rept. No. 105, 80th Cong., 1st Sess., p. 10) :

"In recent years, the number of cases involving disputes with respect to the choice of bargaining representatives in the units which they shall represent have become the major business of the National Labor Relations Board. * * * In view of the tremendous number of such cases, therefore, it is of utmost importance that the regulations and rules of decision by which they are governed be drawn so as to insure to employees the fullest freedom of choice."

Cf. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 47, "It must be emphasized that one of the principal purposes of the National

One of the "practical adjustments" which the Board in the exercise of this discretion has made is that the designation of a bargaining agent is inappropriate or ineffective if the number of employees in the bargaining unit is not, by reason of projected new or expanding operations, substantially representative of the employer's anticipated work force. Thus, for example, the Board declines to entertain, as premature, a petition filed under Section 9 of the Act requesting it to hold an election and determine the employees' choice of a bargaining agent, if "the unit sought is still expanding, and is not at present representative of the anticipated work force." *Coast Pacific Lumber Co.,* 78 N. L. R. B. 1245, 1246. Accord, *Westinghouse Electric Corporation,* 85 N. L. R. B. 1519; *Anaconda Wire and Cable Co.,* 91 N. L. R. B. No. 37. Similarly, the Board in that situation holds that a union may not act as the statutory bargaining representative of the employees in the unit and that a collective bargaining agreement between it and the employer establishing terms and conditions of employment is ineffective under the Act. *Daniel Hamm Drayage Co.,* 84 N. L. R. B. 458, enforced 185 F. 2d 1020; cf. *Chicago Freight Car and Parts Co.,* 83 N. L. R. B. 1163.[7]

The reasons which underlie the Board's policy in this respect are manifest. A contrary view, which would permit, in the circumstances under considera-

Labor Relations Act is to give employees full freedom to choose or not to choose representatives for collective bargaining."

[7] See also National Labor Relations Board, *Eleventh Annual Report* (1946), p. 14, n. 26; *Ninth Annual Report* (1944), p. 27.

tion, the initial working force to designate the statutory bargaining agent, would mean that the choice of bargaining agent would reflect not the choice of a majority of the electorate but merely the preference of a nonrepresentative minority. The great number of employees on whose behalf the union would act as exclusive bargaining representative would have had no voice in that critical choice or opportunity to make known their wishes. One of the serious consequences flowing from such a view is illustrated by the instant case. A bargaining agent selected by a small nonrepresentative initial work force would be enabled to enforce closed-shop and other conditions of employment upon a vast number of employees who had been effectively foreclosed from selecting their bargaining representative or making known their wishes as to the terms or conditions of employment which the bargaining representative was authorized to seek on their behalf.

The Board's policy is designed to avoid such results so plainly inconsistent with the principle of majority rule adopted in the Act and the basic statutory policy of affording to employees the fullest freedom in the exercise of their right to bargain through representatives of their own choosing. We submit, therefore, that the Board's policy is not "without justification in law or in reason." *Tower* case, *supra,* p. 332.

The policy thus established by the Board, so clearly warranted by both law and reason, is dispositive of the instant case. The undisputed facts (*supra,* pp. 4–5) show that on August 16, 1947, respondent recognized the Operating Engineers as the exclusive

bargaining representative of members of that craft employed and to be employed by respondent and entered into a closed-shop contract with the union making membership in it a condition of employment. On that date respondent's operations on the Hanford project had just barely begun; all of the parties knew that these operations were in their initial stage and that they would be of an extensive nature requiring the employment of several thousand employees. On August 16, respondent had in its employ on the project only 125 manual employees. In the unit for which the Operating Engineers were recognized as exclusive bargaining representative, there were only ten operating engineers. Approximately four months later, respondent's initial work force had expanded to 5,400 manual employees. The number of operating engineers had increased to 740. It is thus clear that respondent's initial complement of operating engineers consisting of ten employees was not, at the time the closed-shop agreement was signed, representative of the work force contemplated and subsequently hired.

In these circumstances, the Board, consistent with its established policy, concluded that the Operating Engineers could not have been, as required by the proviso to Section 8 (3), the representative of a majority of the employees in the bargaining unit when the closed-shop agreement was executed. It follows, therefore, as the Board further found, that the closed-shop agreement does not satisfy the requirements of the proviso and hence affords no defense to respondent's discharge of Hewes.

We do not understand respondent to seriously challenge the general propriety of the Board's policy discussed above. Respondent challenges the Board's conclusion with respect to the invalidity of the contract under the proviso upon three grounds.

First, respondent urged before the Board (R. 52) that the contract was executed in accordance with the "historical pattern of labor contracting" adopted by employers and unions in the construction industry and therefore the proviso should be deemed inapplicable (R. 52; 13–14, 40–42). But this argument, as the Board pointed out (R. 52), overlooks the critical fact that Congress enacted no qualification and intended none[8] to the proviso based upon the custom in any industry. Pertinent here, therefore, is the observation in a related context of the Circuit Court of Appeals for the Second Circuit in *N. L. R. B.* v. *National Maritime Union of America,* 175 F. 2d 686 (C. A. 2), certiorari denied, 338 U. S. 954, quoting with approval from a decision of the Board (at p. 689).

> " 'We are asked by the Respondents to consider the economic facts which gave rise to the hiring hall in the maritime industry and which, in the view of the Respondents, require its continuance in the future. It is said that the peculiar characteristics of maritime employment require that a union control and regulate the supply of labor in order to avoid the graft, favoritism, and indignities which in past years have attended job-seeking in this industry. It

[8] S. Rept. No. 573, 74th Cong. 1st Sess., p. 11; H. Rept. No. 972, 74th Cong. 1st Sess., p. 17.

is also said that the Respondents' hiring halls have made possible a fair rotation of jobs, and an even supply of labor, in the best interests of seamen and shipowners alike. Insofar as such factors touch upon the wisdom of legislation which renders the NMU hiring halls unlawful, they, of course, raise considerations which can have no bearing on our determination of the issue before this Board. The full facts concerning the reasons for and operation of maritime hiring halls were brought to the attention of the Congress prior to the enactment of the amended Act. The Congress determined that the public interest required that hiring halls involving discrimination against employees who are not union members be outlawed. This determination is binding upon us. It is our duty to administer the law as written, not to pass upon the wisdom of its provisions.'

We, too, take that position. Sometimes, to be sure, the nature of a statute is such that impliedly it delegates to the courts, in interpreting it, the power and duty to round out the legislative legislation by judicial legislation which involves considerations of social policy. But where, as here, the legislature's purpose is plain, there is no room for such judicial 'lawmaking'."

Secondly, respondent urged before the Board (R. 53, 76–77, 85; 14–15, 31–33) that the contract should be exempted from the requirements of the proviso because it was executed in good faith by respondent and in response to the "exigencies of the construction program" undertaken by the Atomic Energy

Commission. Long ago this Court disposed of a similar contention in these words (*N. L. R. B.* v. *Star Publishing Co.*, 97 F. 2d 465, 470):

> The Act prohibits unfair labor practices in all cases. It permits no immunity because an employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by employers.

See also *N. L. R. B.* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445, 449 (C. A. 9); *N. L. R. B.* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C. A. 6); *N. L. R. B.* v. *Don Juan, Inc.*, 185 F. 2d 393 (C. A. 2).

Finally, respondent asserted (R. 48–49, 77; 15, 26–28) that the Board was estopped from exercising jurisdiction in the instant case [9] because the contract pursuant to which Hewes was discharged was executed when it was the Board's policy to decline to exercise jurisdiction over enterprises engaged in the construction industry. The Board properly rejected this contention. The past practice of the Board not to exercise jurisdiction over construction operations

[9] Respondent also argued that its operations did not fall within the coverage of the Act and that the Board could not properly assert jurisdiction in the instant case. This contention can no longer be urged in view of the recent holdings of the Supreme Court in *N. L. R. B.* v. *Denver Building Trades Council*, 341 U. S. 675, and companion cases.

The additional contention urged by respondent that the Board could not properly assert jurisdiction over respondent's operations because the product of the Hanford atomic energy works is for use or consumption by the Government must be rejected in view of the ruling in *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 511–512.

in no way precludes the Board from exercising it now and finding contracts executed in violation of the Act to be invalid. That abstention, as the Board has stated (R. 48–49, 78–79), was based upon administrative choice rather than legal necessity and affords no support for respondent's contention. "The principles of equitable estoppel [cannot] be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials." *N. L. R. B.* v. *Baltimore Transit Co.*, 140 F. 2d 51, 55 (C. A. 4), certiorari denied, 321 U. S. 795, and cases cited there; cf. *Wallace Corporation* v. v. *N. L. R. B.*, 323 U. S. 248, 253.

Point II

The Board properly found that respondent rendered illegal assistance to the operating engineers in violation of Section 8 (a) (1) of the Act

As we have shown above, pp. 9–14, the Operating Engineers were not the exclusive bargaining representative designated or selected by a majority of the employees in the bargaining unit when the closed-shop agreement was signed. The union was therefore neither entitled to recognition as the statutory representative nor to enforcement of its closed-shop contract. In these circumstances, respondent's unlawful recognition of the union as the statutory bargaining representative of the employees in question and its enforcement of the closed-shop contract by requiring as a condition of employment membership in the union and by discharging Hewes because of his nonmembership in the union constituted, as the Board found,

employer assistance to a labor organization banned by Section 8 (a) (1) of the Act. Such action on the part of an employer accords to the union a status to which it is not entitled, is in derogation of the rights of employees to bargain collectively through representatives of their own choosing and impairs the freedom which the Act guarantees to employees in the exercise of their rights under the statute. *N. L. R. B.* v. *Electric Vacuum Cleaner Co.,* 315 U. S. 685, 692–693; *N. L. R. B.* v. *Cowell Portland Cement Co.,* 148 F. 2d 237 (C. A. 9), certiorari denied, 326 U. S. 735; *N. L. R. B.* v. *Mason Mfg. Co.,* 126 F. 2d 810 (C. A. 9).

Point III

The Board's order is proper and valid

As already stated (*supra,* p. 7), the Board's order requires respondent to offer Hewes reinstatement to his former or equivalently substantial position with back pay. Before the Board, respondent challenged the validity of any Board order requiring it to reinstate Hewes with back pay because the latter did not seek reinstatement after the expiration of the closed-shop contract on August 10, 1948 (R. 54, n. 15; 30, 172). But it is well settled that it is not incumbent upon an employee discriminatorily discharged to take the initiative and seek reinstatement in order to make available the remedies provided by the Act. It is for the offending employer to remedy his illegal action by offering reinstatement to the discharged employee and thereby bring about "a restoration of the situa-

tion, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge Corp.* v. *N. L. R. B.,* 313 U. S. 177, 194). *N. L. R. B.* v. *Cowell Portland Cement Co.,* 148 F. 2d 237, 245 (C. A. 9), certiorari denied, 326 U. S. 735; *N. L. R. B.* v. *East Texas Motor Freight Lines,* 140 F. 2d 404, 405 (C. A. 5); *United Biscuit Co* v. *N. L. R. B.* 128 F. 2d 771, 773 (C. A. 7).

The Board also ordered respondent to cease and desist from recognizing the Operating Engineers as the bargaining representative of any of its employees and from giving effect to the closed shop agreement or any extension thereof, unless or until the union has been certified by the Board as the statutory representative of respondent's employees, provided, however, that in no event shall this be construed as waiving any provisions of Section 8 and 9 of the Act, as amended (R. 55).[10] In view of the illegal assistance found, the Board was warranted in requiring respondent to withhold recognition from the union until such time as the Board may determine that the effect of that illegal assistance has been dissipated. The conditioning of recognition on a Board certification insures that the Board will have the opportunity to make such a determination. The injunction against giving effect to the contract is designed to avoid

[10] The amended Act permits the making of an agreement between the employer and the statutory bargaining representative requiring membership in the union as a condition of employment provided that a majority of the employees duly authorize the union to make such an agreement. Sections 8 (a) (3) and 9 (e) of the Act.

perpetuating the illegal assistance given to the union. The remedy prescribed by the Board in this respect is thus "adadpted to the situation which calls for a redress" (*N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348). *N. L. R. B.* v. *Cowell Portland Cement Co.,* 148 F. 2d 237, 246 (C. A. 9), certiorari denied, 326 U. S. 735; *N. L. R. B.* v. *Graham Ship Repair Co.,* 159 F. 2d 787, 788 (C. A. 9); *Elastic Stop Nut Corp.* v. *N. L. R. B.,* 142 F. 2d 371, 380 (C. A. 8), certiorari denied, 323 U. S. 722, *N. L. R. B.* v. *Norfolk Shipbuilding & Drydock Corporation,* 172 F. 2d 813, 816 (C. A. 4).

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid and proper, and that a decree should issue enforcing the order in full as prayed in the Board's petition.[11]

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AUGUST 1951.

[11] Since the Board issued its order in the instance case, the Operating Engineers have been certified by the Board as the bargaining representative of certain of respondent's employees at the Hanford project. *Matter of Guy L. Atkinson etc.*, Case No. 19–RC–646. This, of course, fulfills the condition subsequent contained in paragraphs 1 (a) and (b) of the Board's order. The remaining portions of the Board's order remain unaffected. We have no objection to the decree and the notice to be posted reciting that the condition stated in paragraphs 1 (a) and (b) of the order has been met with respect to the employees covered by the certification.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

Unfair Labor Practices

Sec. 8. It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the

exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discour-

age membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such

affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

Effective Date of Certain Changes

Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

U. S. GOVERNMENT PRINTING OFFICE: 1951

No. 12,880

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GUY F. ATKINSON CO., (a Corporation), and J. A. JONES CONSTRUCTION CO., (a Corporation),
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT GUY F. ATKINSON CO. AND J. A. JONES CONSTRUCTION CO.

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FILED
SEP 24 1951

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BRIEF FOR RESPONDENT

GUY F. ATKINSON CO. AND J. A. JONES CONSTRUCTION CO.

SUPPLEMENTAL STATEMENT OF THE CASE.

The statement of the case contained in the Board's brief (pp. 2-8) is correct insofar as it goes, but it omits mention of an important circumstance which Respondent considers to be basic to the correct determination of the case.

This case is one of the first in which the National Labor Relations Board has undertaken to exercise

jurisdiction over the building and construction industry. Under the original National Labor Relations Act, the Board, as a matter of administrative policy, refused to extend the benefits, burdens and sanctions of the Act to that industry. As expressed by the Board in its Decision, Order and Direction of Election in the *Matter of the Plumbing Contractors Association of Baltimore, Maryland, Inc.,* April 2, 1951, 93 NLRB No. 177, footnote 12, 27 LRRM 1516:

> "The Board did not, under the Wagner Act, customarily assert jurisdiction over the building and construction industry. See *Johns-Manville Corporation,* 61 NLRB 1."[1]

The matter was stated in this proceeding at the oral argument before the Board in the following terms (R. 107-108):

> " 'Chairman Herzog: I do not know how other counsel are going to feel about that. I am not stating what my own final position is, but——
>
> " 'Let me ask you this: If this was a Wagner Act issue, although coming up in 1949 before us, **certain principles enunciated by the old Board under the Wagner Act would be sufficient to protect your client against liability?**[2]
>
> " 'Mr. Johnson: That is the way we view that.
>
> * * *
>
> " 'Mr. Murdock: Under Section 102 of the Taft-Hartley Act, and **due to the fact that under the Wagner Act this Board never asserted juris-**

[1]See, also, R. 54, footnote 15; *In the Matter of Brown & Root* (1943), 51 NLRB 820; *In the Matter of Brown & Root, Inc.* (1948), 77 NLRB 1136.

[2]Throughout this brief, emphasis is ours unless otherwise noted.

diction over the construction industry, does that fact distinguish this case?

"'Mr. Johnson: Yes, I think it does. I think you have put your finger right on the essential point.

"'Mr. Murdock: **It seems to me that one of the very important aspects of the case is that the Board never asserted jurisdiction over the construction industry under the Wagner Act** and then, if we come to the conclusion that this contract was entered into subject to the Wagner Act, what then?

"'Mr. Johnson: That is the very point, Senator.'"

This refusal to assert jurisdiction over the building and construction industry is a fundamental operative fact which cannot be glossed over or brushed aside. The policy meant that insofar as this entire industry was concerned *there was no Federal law in effect regulating and stabilizing labor relations in the industry.* Under the original Act, as under the amended Act, the Board had important, day-to-day functions to perform in connection with labor relations in the industries over which it asserted jurisdiction. It maintained numerous regional and subregional offices throughout the country. Through these offices it not only received and investigated charges of unfair labor practices, held hearings in connection therewith and issued authoritative decisions and remedial orders, but it also received and investigated representation petitions, determined appropriate bargaining units, held elections and issued certificates of majority status.

The policy of abstention adopted by the Board insofar as the building and construction industry was concerned meant that none of this elaborate machinery for stabilizing labor relations was made available to management and labor in that industry. If an individual or a union representative in the industry considered that he or the union was the victim of an unfair labor practice and went to a regional or subregional office of the Board to complain, he was told that the Board did not take jurisdiction over the building and construction industry, and that the complaint would not be processed. If a building and construction trades union wanted to establish its representative status, or if a construction employer questioned the majority status of a union or the appropriateness of the unit it claimed to represent, and if either appealed to the Board for guidance and assistance, he was told that his petition would not be entertained. Neither the facilities of the Board, nor the protection of the Act, was extended to a construction employer or employee.

The result of all this was that none of the vexing problems connected with the determination of representative status in the building and construction industry were ever considered or settled by the Board (see *infra,* pp. 26-32). Labor and management in this vast and complicated industry were left to work out their problems without the aid of the Board or its facilities. Thus, the parties to the closed-shop contract of August 16, 1947, which the Board held in this proceeding to be invalid because it did not cover an appropriate bargaining unit, *were denied the use of*

the statutory facilities for determining such unit in advance of the execution of the contract.

As pointed out by the Board in its Decision and Order (R.50-51) and in its brief (p. 2, n. 3), the contract of August 16, 1947, was entered into during the period between the enactment date and the effective date of the amended Act, and therefore its availability as a substantive defense is to be determined under the provisions of Section 102 of the amended Act (61 Stat. 136, 29 U.S.C. Supp. III, secs. 151, *et seq.*). That section provides as follows:

> "Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto."

In view of the provisions of Section 102, the discharge of Chester R. Hewes pursuant to the require-

ments of the closed-shop contract of August 16, 1947, was not an unfair labor practice unless it would have been an unfair labor practice if it had taken place prior to the effective date of the amended Act. At that time, as we have shown, it was the fixed policy of the Board not to assert jurisdiction over the building and construction industry, either for the purpose of preventing unfair labor practices or for the purpose of assisting in the determination of appropriate bargaining units. Therefore, the Decision and Order of the Board in this case constitutes a determination that the Board may impose the unfair labor practice sanctions of the Act upon labor and management for the selection of an "inappropriate" bargaining unit even though such selection was made at a time when the parties were being denied any assistance from the Board in connection therewith and when they had been led to believe, by the Board itself, that they were free to proceed without regard to the unfair labor practice provisions of the Act.

The implications of such a determination are far-reaching and grave. For example, the Board, by a 3 to 2 decision, has recently reaffirmed its policy of not asserting jurisdiction over the hotel industry. *Hotel Association of St. Louis,* January 17, 1951, 92 NLRB, No. 215, 27 LRRM 1243.

In the *Hotel Association* case the majority of the Board said (27 LRRM 1244):

> "We have carefully reexamined the Board's policy of not exercising jurisdiction over the hotel industry, in the light of the record and of the position of the parties as set forth in the briefs and oral argument in this case. We do not

> believe that a settled policy, indorsed by all those members of Congress who have recorded an opinion on the subject, should be lightly overturned by the action of this administrative Board."

In a vigorous dissent, the minority members said (27 LRRM 1246):

> "It is a well established principle of statutory construction that exemptions from legislation such as ours must be strictly construed. At least they should be expressed—and expressed in the statute by the Congress. We see no justification for this Board to write an exemption of the hotel industry into the Act, particularly in a time of national emergency and national defense effort; that in effect is what the decision of the majority does."

If hereafter the same Board, or a differently constituted Board, could legally and constitutionally reverse this policy decision and invalidate contracts executed, and treat as unfair labor practices acts performed, during the period while the original policy was in effect, it would be within the power of the Board to disrupt labor-management relationships in the entire industry. Further, even while the present policy of abstention as to the hotel industry continues in effect, the possibility of the exercise of such arbitrary and inequitable power would create intolerable conditions of uncertainty and instability in labor relations in the industry, contrary to the "primary objective of Congress in enacting the National Labor Relations Act" *(Colgate-Palmolive-Peet Co. v. National Labor Relations Board* (1949), 338 U.S. 335, 362).

SUMMARY OF ARGUMENT.

Respondent contends that the Board has no authority or power, under the National Labor Relations Act, to invalidate a collective bargaining agreement on the ground that the unit covered is inappropriate or to treat as an unfair labor practice action taken pursuant to such an agreement, where the agreement was executed and the action taken at a time when the Board was refusing to exercise jurisdiction over the industry involved. It contends, further, that, assuming the Act grants such authority and power, the exercise thereof constitutes a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

In support of these contentions Respondent submits as follows:

1. The closed-shop contract of August 16, 1947, covered a collective bargaining unit consisting of all operating engineers then employed or thereafter to be employed on the Hanford Engineering Works Project by Respondent, which was a joint venture composed of members of The Associated General Contractors of America, Inc. The agreement was made in good faith with the labor organization which was, in actual fact, the historically recognized and duly authorized collective bargaining representative of a majority of the operating engineers employed by members of The Associated General Contractors of America operating within the area in which the project was located. Since the Board, at and before the time the agreement was made, was withholding from the parties the statutory facilities for the determina-

tion by it of an appropriate unit, the agreement cannot be invalidated by an *ex post facto* determination by the Board that the unit selected by the parties was "inappropriate."

2. The retroactive application of the change in the Board's administrative policy of abstaining from the exercise of jurisdiction over the building and construction industry in such a way as to nullify rights acquired, and to impose sanctions for actions taken, in reliance upon the original policy of abstention is contrary to the intent of Congress and is a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

3. The enforcement of the unfair labor practice provisions of the Act against parties who have been denied the benefit of the representation election provisions of the Act is contrary to the intent of Congress, and a denial of due process of law in contravention of the Fifth Amendment, particularly where the finding of an unfair labor practice rests upon a determination that a bargaining unit selected by the parties in default of assistance from the Board was "inappropriate".

4. Such portion of the Board's order as directs Respondent to pay back wages to Chester R. Hewes is invalid and improper.

5. Since it appears that Chester R. Hewes would have been rehired upon application to Respondent after the closed-shop contract of August 16, 1947, was superseded by an open-shop contract effective

August 10, 1948, such portion of the Board's order as directs Respondent to pay back wages to Chester R. Hewes for any period after August 10, 1948, is invalid and improper.

ARGUMENT.

I.

THE CLOSED-SHOP CONTRACT OF AUGUST 16, 1947, COVERED A COLLECTIVE BARGAINING UNIT CONSISTING OF ALL OPERATING ENGINEERS THEN EMPLOYED OR THEREAFTER TO BE EMPLOYED ON THE HANFORD ENGINEERING WORKS PROJECT BY RESPONDENT, WHICH WAS A JOINT VENTURE COMPOSED OF MEMBERS OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. THE AGREEMENT WAS MADE IN GOOD FAITH WITH THE LABOR ORGANIZATION WHICH WAS, IN ACTUAL FACT, THE HISTORICALLY RECOGNIZED AND DULY AUTHORIZED COLLECTIVE BARGAINING REPRESENTATIVE OF A MAJORITY OF THE OPERATING ENGINEERS EMPLOYED BY MEMBERS OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA OPERATING WITHIN THE AREA IN WHICH THE PROJECT WAS LOCATED. SINCE THE BOARD, AT AND BEFORE THE TIME THE AGREEMENT WAS MADE, WAS WITHHOLDING FROM THE PARTIES THE STATUTORY FACILITIES FOR THE DETERMINATION BY IT OF AN APPROPRIATE UNIT, THE AGREEMENT CANNOT BE INVALIDATED BY AN EX POST FACTO DETERMINATION BY THE BOARD THAT THE UNIT SELECTED BY THE PARTIES WAS "INAPPROPRIATE".

A. The contract involved.

The contract of August 16, 1947, recites the fact that it is being made and entered into between a joint venture composed of affiliated members of The Associated General Contractors of America, Inc., as the Employer, and various signatory unions affiliated

with the Building and Construction Trades Department of the American Federation of Labor having jurisdiction of the territory in which the Hanford Engineering Works Project is located, thereinafter to be called the "Union" (R. 147). It provides that it shall "cover all employees who are members of the signatory unions who are performing work within the recognized jurisdiction of such unions as the same is defined by the Building Trades Department of the American Federation of Labor, for which employees the Union is recognized as the sole and exclusive bargaining agent" (R. 148-149). It then provides that "the Employer shall hire all employees coming under this Agreement, through the office of the Union or through such other facility as may be designated by the Union," and that "the Employer shall retain in employment only members in good standing of Union or Those Who have signified their intention of becoming members through the regularly established procedure of the Union" (R. 149). Thereafter it provides for the work schedule, overtime, show up time and holidays (Art. VI), for the procedure to be followed in the settlement of disputes, including jurisdictional disputes (Art. VII), for special provisions pertaining to other employers and employees (Art. VIII), for certain rules governing health, sanitation and safety (Art. IX), for miscellaneous basic conditions (Art. X), for wage scales and working rules (Art. XI) and for its effective date and duration. (Art. XIII) (R. 150-159). The contract was signed by 15 building trades unions, including the Interna-

tional Union of Operating Engineers, which was represented in the area by Local Union No. 370 (R. 159-160).

B. The issue as to whether the contract comes within the proviso to Section 8(3).

The initial question which the Board had to determine, and which is now presented to this Court, is whether the contract of August 16, 1947, came within the proviso to Section 8 (3) of the original Act as "an agreement with a labor organization * * * [which] is the representative of the employees as provided in Section 9 (a), in the appropriate bargaining unit covered by such agreement when made." By virtue of the provisions of Section 102 of the amended Act (quoted *supra,* p. 5), such question must be determined in the light of the rules and policies prevailing prior to the effective date of the amended Act.

Initially, it should be pointed out that the fact that a single agreement, such as the contract of August 16, 1947, covers more than one bargaining unit has not been considered as taking the agreement out of the protection of the proviso to section 8 (3). In *American-West African Lines, Inc.* (1940) 21 N.L.R.B. 691, the Board said (pp. 701-702):

> "We are of the opinion that a contract, such as the one here involved, covering employees precisely within separate yet respectively appropriate bargaining units is, if made with the lawful and exclusive representative of the employees in each unit, in accordance with the terms of the proviso clause. **It is immaterial that the parties to such a contract have incorporated into one instrument what could have been done in two.**"

The Board held that the contract of August 16, 1947, did not come within the terms of the proviso to Section 8 (3) because it was not made with the representative of the employees in an appropriate unit. It said (R. 52):

> "It thus clear, without considering further increments thereafter and *without attempting to determine the scope of an appropriate unit,* that in virtually all categories, including that of the operating engineers, *the work force at the time the contract was signed was not at all representative of that shortly to be employed.* Under these circumstances, the union could not have been, as required by the proviso to Section 8 (3), the representative of the employees in an appropriate unit."

In support of its Decision and Order the Board argues in its brief that its determination that the bargaining unit covered by the contract of August 16, 1947, insofar as concerns operating engineers, was "inappropriate," was essential to "afford to employees the fullest freedom in their choice of bargaining representatives and to insure that the choice of representatives reflects 'the will of the majority of the electorate' " (Board's Brief, p. 11). This argument, while it would undoubtedly be pertinent to the establishment of a bargaining unit to govern labor-management relations for the future, has no relevance whatever to the issue involved in this proceeding. Concededly, the validity of the contract of August 16, 1947, is to be determined under the rules in effect prior to the effective date of the amended Act (R.

50-51; Board's Brief, p. 2, n. 3). Concededly, also, at that time the Board was refusing to entertain petitions for the determination of appropriate bargaining units in the building and construction industry, or to hold any representation elections in that industry (R. 54; Board's Brief, pp. 17-18). Therefore, the issue is, not what unit would be appropriate for future collective bargaining in the building and construction industry, but whether a collective bargaining agreement covering a unit selected by the parties in the absence of assistance of the Board and at a time when the Board's facilities were being withheld from them, which unit is reasonably consistent with the basic standards and policies of the Act, can be invalidated by the Board on the ground that it considers the unit "inappropriate".

On the issue as thus defined, Respondent submits that the respective craft units covered by the contract of August 16, 1947, far from being "inappropriate," were in fact the units most in keeping with the policy of the Act, namely, "the policy of efficient collective bargaining" (*Pittsburgh Plate Glass Co. v. National Labor Relations Board* (1941) 313 U. S. 146, 165). They were also the units which, in the building and construction industry, most nearly conformed with the following factors which the Board itself has said should govern the determination of an appropriate bargaining unit (see *Pittsburgh Plate Glass Co. v. National Labor Relations Board, supra,* p. 153):

> "(1) the history, extent, and type of organization of the employees; (2) the history of their

collective bargaining, including any contracts; (3) the history, extent, and type of organization, and the collective bargaining, of employees of other employers in the same industry; (4) the relationship between any proposed unit or units and the employer's organization, management, and operation of his business, including the geographical location of the various plants or parts of the system; and (5) the skill, wages, working conditions, and work of the employees."

C. The unique labor relations problems of the building and construction industry.

The General Counsel and the Board have recognized that the building and construction industry presents special and peculiar problems in collective bargaining and other labor-management relations.

In his initial public pronouncement concerning the impact of the amended Act upon the building and construction industry, the then General Counsel, Robert N. Denham, in an address on February 11, 1948, before the 29th Annual Convention of The Associated General Contractors of America at Dallas, Texas, said (21 LRRM 44, 45-46):

> "The old Wagner Act was general and simple in its terms. It allowed the Board a broad degree of discretion as to the character of cases it would hear or would not hear. It had only one kind of complaint cases—unfair labor practices by employers. That is one of the reasons why **the Board could, and so readily did, take the position, not that it did not have jurisdiction, but that it would not serve to effectuate the**

purposes of the Wagner Act by going into the building and construction industry. To be sure, this avoidance was, in the main, largely predicated on the theory that these businesses are substantially local in nature and that labor relations within the industry were fairly stable. As long as that theory existed, the employers were content to be left alone and the unions were satisfied and, because of the absence of other rights to be interfered with, no one took occasion to object to the Board refusing to extend its operations into that field.

* * *

"But as we approach the construction industry and the trade unions and contractors that are engaged in it, we find ourselves dealing with something which fits into none of the orthodox categories of industry or employment with which the Board is accustomed to dealing. The whole industry is unique in many ways and the mere pattern of employment differs wholly from that to which we have been accustomed. Neither the employee nor the employer stand on stable ground so far as either identity of the employer or the location of the work is concerned. But, regardless of all that, we have a law to administer. It is a law with provisions that vitally affect this industry, and does not leave the employers and the employees wholly free to carry on their relationships in the traditional manner, with eyes completely closed to the existence and provisions of the Taft-Hartley Act."

Thereafter, Mr. Denham, while he was still the General Counsel, appeared at the oral argument of this

case before the Board on December 19, 1949, and issued a proposed statement of enforcement policy in which he stated, in part as follows:

> "Special considerations peculiar to certain portions of the building and construction industry, **including unique employment relationships, bargaining patterns and traditions and unit and eligibility questions** have prevented the National Labor Relations Board and the General Counsel of the Board from establishing satisfactory administrative machinery for conducting union security elections as provided by Sections 8(a)(3) and 9(e) of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136).
>
> "These provisions presuppose some degree of stable employment among the employees whose vote will decide whether their employer and their collective bargaining representative may agree to require membership in the Union as a condition to their continued employment. The building and construction industry, however, is singularly lacking in that degree of stability of employment which is required if elections are to be held under the conventional procedures established pursuant to Section 9(c) and 9(e) of the Act. **Employment in the building and construction industry differs radically in its nature and duration from that in other industries.** As a general rule the building and construction craftsmen work only sporadically for any one employer. Their term of employment is short because their work is limited to the performance of a specialized operation on the construction projects of any number of different contractors. Each job may require only a few days of work. When the job

> is completed, the craftsmen must seek new employment with other contractors. They enjoy regular employment only by reason of the availability of a series of short term jobs on a variety of construction projects under contract with different contractors."

On June 6, 1950, the Board issued a response to this statement in which it acknowledged the existence of "certain widely-recognized difficulties which flow from the character of employment relations in the building construction industry". The General Counsel's statement and the response of the Board thereto are printed in full in the Appendix to this brief.

Most recently, in testifying at a hearing on September 4, 1951, before the Special Subcommittee on Labor-Management Relations of the Senate Committee on Labor and Public Welfare, with reference to S. 1973, now pending before Congress (see *infra,* p. 31), George J. Bott, the present General Counsel, said concerning problems encountered in the building and construction industry (Transcript, Vol. 4, pp. 332-337):

> "The complement of employees changes from job to job. The complement consists of a pool of craftsmen or workmen from which all the contractors in the trade draw for their labor. The workmen, both skilled and unskilled, are constantly moving from job to job. No single employer can be identified as their employer in the conventional sense. They may work for a dozen different contractors in a single year.
>
> "An appropriate unit of employees ordinarily implies a definite employer employing identifiable

employees. If the unit were to be defined on the particular construction project the contractor's work on the project might be completed by the time an election could be held. Conducting elections throughout the industry on this basis might disenfranchise craftsmen not actually employed on the voting eligibility dates fixed by the Board or at the time of the actual election.

"Many craftsmen might be voting in more than one election in view of their employment by so many different employers throughout a short space of time. Perhaps the unit could be an association-wide unit, be held on an association-wide basis, or an area, geographical area-wide basis.

"Perhaps employees not working for any employer in the association or in the area at the time of a proposed election should be permitted to vote if they work for any employer in the association or in the area for some time prior to the election. If so it would be necessary to prescribe the minimum period of employment.

"**This is only an indication of the new vista confronting the Board in tackling election cases in the building and construction field.** Early in the administration of the amended Act the General Counsel decided that viewed realistically the construction workers in any given craft employed with some degree of regularity in discernible economic areas constituted labor pools from which the organized contractors in that area drew for their labor requirements.

"In other words, the concept was that all of the construction workers in any given craft employed

by any of the organized contractors in the area during a respresentative period were the employees of all of the organized contractors and that such employees constituted the appropriate unit.

* * *

"Mr. Barbash. Mr. Bott, were you convinced of the practicability of the labor pool theory?

"Mr. Bott. I think it is a good theory. I think it might work, and it depends upon the good will and the cooperation you get from the parties involved. It also has some defects which I think I can describe a little later in describing the Michigan election. **It may, however, cut across and be in derogation of the standards developed by the National Labor Relations Board over the many years in holding the ordinary elections which raises a problem of itself.**

"It is a very serious matter to go into a big election on a novel theory not knowing when you get through with it whether the Board will accept it as its own theory and whether or not the courts will accept its legality, but I think it was an attractive theory, and **I am not sure that we have anything to substitute for it,** but I hope to —I think that may be evident when I finish."

D. The practical circumstances under which the contract of August 16, 1947, was negotiated.

The Hanford Engineering Works Project is located near Richland, Washington, which is approximately 160 miles from Spokane and approximately 215 miles from Seattle. At the start of the project, there was no large labor supply of any sort readily at hand,

and the local supply of the qualified construction workers needed for Respondent's work was wholly inadequate.

Customarily, the problem of securing an adequate labor supply for specific construction projects, subject to wages and other working conditions which will be known to all interested parties in advance, is handled by the negotiation of area agreements between associations of contractors and the various building and construction trades unions having jurisdiction in the geographical area where the various projects are to be performed. The custom and practice in this regard was concisely stated by the Wage Stabilization Board when it issued General Wage Regulation 12 on May 31, 1951, establishing the Construction Industry Stabilization Commission, as follows (16 F.R. 6640):

> "The work of the [building and construction] industry is performed on separate project sites, rather than in fixed industrial plants. Both contractors and workers are mobile. Contractors move into an area, complete their project as required or allowed by such variables as weather conditions and contractual provisions, and move on to a new job site. Workers may be employed by a number of different contractors, on different projects, in the course of a single season. The employment relationship is thus temporary and intermittent.
>
> "The construction industry is highly organized both as to contractors and workers. Most of the approximately 2,500,000 employees belong to one

of the 19 international unions affiliated with the Building and Construction Trades Department of the AFL, and most contractors, general, specialty or home builders, bargain through associations. Collective bargaining typically takes place between the unions and associations in a locality, and normally proceeds with each craft union negotiating separately. There may also be participation by the national unions and contractors associations. There are accordingly many thousands of separate agreements entered into each year. The wage rates determined through these negotiations are adopted in many cases by contractors who are not association members.

* * *

"The regulation authorizes the Commission to stabilize wages on the basis of areas traditionally established for collective bargaining purposes. **This is called for by the nature and practice of the industry and is in accord with stabilization experience.**"

While these area agreements are concluded prior to the start of most of the projects to which they are intended to apply (R. 204), the unions with whom they are signed are in actual fact the long-established and traditional bargaining representatives of the only men who are qualified and available to work on such projects. The agreements establish the wages, hours and other working conditions which will apply to projects performed while they are in effect, thereby enabling the contractors who are parties to them to make firm commitments involving such labor costs. They also establish orderly procedures for the settlement of dis-

putes arising during the course of a specific project without costly interruptions in the work.

At the time Respondent started to prepare for the performance of work at the Hanford Engineering Works Project there was an available area agreement in effect for the geographical area in which the project was located covering operating engineers and teamsters, which had been negotiated under date of February 28, 1947, by the Spokane Chapter of The Associated General Contractors of America, Inc. (R. 119-122). This agreement contained closed-shop provisions similar to those incorporated into the contract of August 16, 1947. Both of the contractors who composed the Respondent joint venture were affiliated members of The Associated General Contractors of America, Inc., so that the area agreement was available to Respondent for use, had it been adequate for Respondent's purposes (R. 180). Since the area agreement did not cover all of the crafts which would be involved in the Hanford Engineering Works Project, however, Respondent determined to negotiate a special project agreement with all of the needed crafts, which is also a customary procedure in the construction industry in similar situations (R. 181).

This project agreement was the closed-shop contract of August 16, 1947. The contract was negotiated with representatives of 15 of the building trades unions, ranging from laborers and operating engineers, which would be the first crafts needed on the job (R. 187), to cement finishers and roofers, which would be the

last crafts needed. It was negotiated and signed at the outset of the work for sound business reasons having to do with the efficiency of all operations, including efficiency of collective bargaining.

In the first place, Respondent had to rely upon the Unions to man the job (R. 181). Efficient construction operations require the services of trained, skilled craftsmen who specialize in construction work and therefore make themselves available for such work. Over a long period of years the building trades unions in the State of Washington and elsewhere in the Western States had become practically the only source of this type of labor (R. 190-191). Therefore, in order to secure assurance that an adequate supply of craftsmen would be available as and when Respondent needed them, Respondent necessarily had to sign an agreement in advance with the Unions which, as a matter of actual, practical fact, represented those craftsmen (R. 190).

Next, it was important to all parties concerned, including Respondent, Respondent's principals, the General Electric Company and the Atomic Energy Commission, and the craftsmen who were to work on the project, to establish in advance the wages and other working conditions which were to prevail. From Respondent's standpoint, and that of its principals, an exact knowledge of labor costs was essential to proper plans for the development of the project, including probable change orders and additions. The location of the project at a site remote from large centers of pop-

ulation, and the restricted and confidential nature of the work, presented special problems for both management and labor which could only be satisfactorily solved by an agreement prior to the start of major operations. Also, the establishment in advance of the wages and working conditions which would apply on the project for all crafts eliminated the delays which would have inevitably occurred if these matters had been left to piecemeal negotiation after each craft had reached its maximum strength on the project. From the standpoint of the workmen, many of whom were necessarily drawn from a great distance to work on the project, the establishment in advance of wages and working conditions through negotiation with their historical and long-established representatives meant that they were assured of acceptable terms of employment before they committed themselves to the work. Any other procedure would not have been understood, would have created great confusion and would have driven away the competent workmen who were so vitally needed on the project.

It was also essential to establish in advance an orderly procedure for the hearing and settlement of any disputes which might occur in the course of the work, either between the Respondent and its workmen or between the various crafts employed on the project. Construction work is always carefully geared to time-schedules for the various operations involved, and any prolonged strike or work-stoppage affecting any one of the operations inevitably disrupts the entire proj-

ect, with serious loss both to the contractors and the workmen. Experience in the construction industry has shown that if a method of settling disputes is established by agreement between management and labor in advance, before any such dispute has arisen, the likelihood of interruptions in the work due to strikes or work stoppages is materially diminished.

E. The problem of the appropriate bargaining unit.

Having in view the custom and practice in the construction industry, and the practical considerations above outlined, there were two possible types of bargaining units which could reasonably be said to have been covered by the contract of August 16, 1947, when made: namely, (1) as to each craft, all members of such craft then employed or thereafter to be employed by Respondent on the Hanford Engineering Works Project, and (2) at least as to operating engineers and teamsters covered by the area agreement of February 28, 1947, all members of those crafts employed or to be employed by members of The Associated General Contractors of America, Inc., operating within the Eastern Washington and Northern Idaho territory. With regard to this second unit, it is apparent that a project contract, such as the contract of August 16, 1947, concluded with the recognized collective bargaining representative of all operating engineers employed or to be employed *within the area* in which the project is located, is an agreement with the representative as provided in Section 9 (a) of the Act of all operating engineers employed or to be employed *on the project.*

Either of these two units would have effectuated "the policy of efficient collective bargaining". Either of the units would also have been in keeping with the other factors mentioned by the Supreme Court in the *Pittsburgh Plate Glass Co.* case, quoted *supra* at page 14. Concededly, either unit would have presented a difficult problem insofar as the holding of an election was concerned, but since the Board was not providing facilities for the holding of *any* elections in the building and construction industry at or prior to the time when the contract was made, this factor should have no relevance.

In its decision and order in this proceeding the Board made no effort to determine whether the bargaining units formulated by management and labor in default of its assistance could be reconciled with the factors which it and the Supreme Court have deemed to be controlling in unit determinations. The only reason it gave for holding that the contract of August 16, 1947, did not cover an appropriate unit was that "the work force at the time the contract was signed was not at all representative of that shortly to be employed" (R. 52). This statement presupposes that on every construction project a point is reached where there is a sufficiently "representative" work force on the job to permit of a representation election. It also implies that postponement of the processes of collective bargaining until such point has been reached and an election has been held would effectuate "the policy of efficient collective bargaining" and would accord with the other factors above mentioned bearing upon unit determinations.

Neither of these suppositions has any basis in fact. On no construction project is there ever a time when the work force can be truly said to be "representative". Construction employees are divided into numerous crafts which from the outset of union organization in this country have been represented by craft unions, chiefly if not exclusively by the 19 building and construction trades unions (see statement of Wage Stabilization Board quoted *supra,* pp. 21-22). There is never a point on a construction project when a "representative" work force of every craft is in the employ of the contractor at the same time.

On a typical building construction project the laborers and operating engineers will come first, to do the excavation and site-clearing work. They will be followed by pile drivers, iron workers and carpenters, who will put in the foundation and the framework of the structure. Then the specialty crafts, such as the electricians, the plumbers, the plasterers and the painters, will do their allotted work. To make matters more complex, these specialty craftsmen are not customarily employed by the general contractor, but are employees of subcontractors. Finally, the cement finishers and the roofers will complete the structure.

Naturally, there is never a clear-cut cleavage between crafts at any stage of the project. For instance, there will probably be some laborers and carpenters on the project from start to finish. But the numbers of these basic craftsmen will fluctuate widely and rapidly, as the project moves from stage to stage.

Frequently specialty craftsmen, such as electricians, will come on the project in large numbers to perform one step for which they are required, will then leave completely and return later in force to perform another step of the project.

In view of these fundamental and inescapable facts, the application to the building and construction industry of the Board's "representative work force" principle—a principle which was developed in other, completely unrelated industries[3]—is impossible if the considerations governing unit determinations which the Board itself has developed are to control and if the standard laid down by Congress, namely, "the policy of efficient collective bargaining", is to be followed.

If the Board disregarded craft lines and held an election on a construction project among all of the men who were on the project when its maximum work force had been reached, for the purpose of selecting a single bargaining representative for the men, it would fly in the face of every factor which the Board has held should govern a unit determination.[4] Such action would ignore completely

[3]The cases cited by the Board in support of this principle arose in a lumber mill (*Coast Pacific Lumber Co.*, 78 N.L.R.B. 1245, 1246), a manufacturing plant (*Westinghouse Electric Corporation*, 85 N.L.R.B. 1519) and a power house (*Anaconda Wire & Cable Co.*, 91 N.L.R.B. No. 37), where the problem of ever-changing craft composition was not involved.

[4]Compare *Ozark Dam Constructors* (1948), 77 N.L.R.B. 1136, where the petitioning organization was a local building trades council. Bargaining through building trades councils is not the prevailing practice in the building and construction industry. See statement of Wage Stabilization Board, quoted *supra*, pp. 21-22.

"(1) the history, extent, and type of organization of the employees; (2) the history of their collective bargaining, including any contract; (3) the history, extent, and type of organization, and the collective bargaining, of employees of other employers in the same industry; (4) the relationship between any proposed unit or units and the employer's organization, management, and operation of his business * * * ; and (5) the skill, wages, working conditions, and work of the employees."

On the other hand, if the Board were to attempt to hold an election within each craft as it approached its maximum numerical strength on the project, for the purpose of selecting a bargaining representative for that craft for the project, it would involve collective bargaining on the project in such tanglefoot that neither the contractor, nor the men, nor the Board would know where they stood. Obviously, such a travesty could not effectuate the basic policy of efficient collective bargaining.

The strongest proof of the almost fantastic inadequacy of the Board's treatment of the "appropriate" unit problem is found in what has happened since the public pronouncement of its decision in this proceeding on June 8, 1950.

On August 9, 1951, Senator Robert A. Taft of Ohio introduced (for himself, Mr. Humphrey, Mr. Cain, and Mr. Nixon) S. 1973 in the Senate of the United States. The proposed bill would amend the Act to provide expressly that an employer engaged in the building and construction industry may make an

agreement covering building and construction trades workmen without the requirement of a *previous* representation election.

The Sub-Committee on Labor-Management Relations of the Senate Committee on Labor and Public Welfare held hearings on this bill on August 27, 28 and 29 and September 4, 1951. One of the main points expressed by witnesses at these hearings was that the irritant that caused the drafting and introduction of the bill was the impractical and unworkable "appropriate" unit test announced by the Board in this proceeding. Almost without exception every witness experienced in the building and construction industry testified that the Board's test cannot be made to work under actual job-site conditions. It is as unrealistic and unworkable as it is erroneous.

The Board's decisions subsequent to its decision and order in this case indicate that upon more careful consideration of the matter, the Board itself has determined that the "representative work force" principle is not workable in the building and construction industry, considered as a whole. When the Board recently decided that it should proceed to hold representation and union security elections in the building and construction industry generally, the bargaining unit which it held to be appropriate for such purposes was a single-craft area-wide unit, namely, all plumbers, plumbers apprentices, and gasfitters employed by members of a designated contractors association in a designated geographical area. *The Plumbing Con-*

tractors Association of Baltimore, Maryland, Inc., April 2, 1951, 93 NLRB No. 177, 27 LRRM 1514; *Plumbing and Heating Contractors Association of Olean, New York,* April 2, 1951, 93 NLRB No. 176, 27 LRRM 1520. **Thus, the Board has now designated as appropriate for the building and construction industry a unit which is of the same type as the unit which could reasonably be said to be covered by the closed-shop contract of August 16, 1947.**

F. The contract of August 16, 1947, should be held to be within the proviso to Section 8 (3) of the Act.

If the Board had been entertaining petitions for representation elections in the building and construction industry at and prior to the time that the contract of August 16, 1947, was executed, and *if* through the exercise of such jurisdiction it had established the principle which it has now announced in the *Baltimore* and *Olean* cases, the parties to that contract, and particularly Respondent, could have protected themselves against the type of unfair labor practice charge involved in this proceeding, and still have secured the important benefits of written contracts executed prior to the start of operations, through the medium of area agreements negotiated by the Spokane Chapter of The Associated General Contractors of America, Inc., with the various craft unions. The refusal of the Board to hold elections and make unit determinations in the building and construction industry deprived Respondent and the unions with which it was required to deal of the assistance and guidance from

the Board to which they were entitled, both in fairness and in law (compare *Ford Motor Co.,* August 2, 1951, 95 NLRB No. 121; 28 LRRM 1371). In view of this circumstance, the Board's determination that the bargaining unit selected by the parties to the contract of August 16, 1947, was not as "appropriate" as one which it might have selected, had it been exercising the jurisdiction given it by the law, should not invalidate a contract which covered a unit reasonably analogous to one which the Board has now approved.

The Board, in its brief (pp. 15-16), assumes that the argument herein made, based upon the custom and practice in the building and construction industry, is directed at securing a determination that the proviso to Section 8 (3) is inapplicable to that industry. As we have shown, however, Respondent contends, not that the terms of the proviso should be ignored, but that in the circumstances of this case, under which the parties were left to formulate a bargaining unit unaided by the Board, such terms should be liberally construed to encompass the unit covered by the contract of August 16, 1947, which unit had developed out of custom and practice **and the demands of efficient collective bargaining** in the building and construction industry. As we have also shown, such use of custom and practical considerations in arriving at the determination of an appropriate bargaining unit is in keeping with the past practice of the Board in other industries.

The Supreme Court has said that the primary objective of Congress in enacting the National Labor Relations Act was "to achieve stability of labor relations" *(Colgate-Palmolive-Peet Co. v. National Labor Relations Board* (1949), 338 U. S. 355, 362). We respectfully submit that in furtherance of such objective, this Court should hold that where, as in this case, the Board has refused to provide the parties with the statutory facilities for the determination of an appropriate bargaining unit, a contract with a labor organization which is the representative of employees in a unit that is reasonably consistent with the basic standards and policies of the Act, is within the terms of the proviso to Section 8 (3) of the Act. We submit, further, that under such a holding the contract of August 16, 1947, would be and is within the protection of that proviso.

II.

THE RETROACTIVE APPLICATION OF THE CHANGE IN THE BOARD'S ADMINISTRATIVE POLICY OF ABSTAINING FROM THE EXERCISE OF JURISDICTION OVER THE BUILDING AND CONSTRUCTION INDUSTRY IN SUCH A WAY AS TO NULLIFY RIGHTS ACQUIRED, AND TO IMPOSE SANCTIONS FOR ACTIONS TAKEN, IN RELIANCE UPON THE ORIGINAL POLICY OF ABSTENTION IS CONTRARY TO THE INTENT OF CONGRESS AND IS A DENIAL OF DUE PROCESS OF LAW IN CONTRAVENTION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

If, despite the reasons given under point I of our argument, this Court holds that the contract of August 16, 1947, does not come within the terms of the

proviso to Section 8 (3), the Court must then determine whether the performance of an obligation under a contract which was executed at a time when the Board was refusing to exercise jurisdiction over the parties can legally and constitutionally be treated as an unfair labor practice by the Board. As we have already noted (*supra,* p. 6), the importance of this question transcends the relatively narrow limits of this case. The Board is continually revising its jurisdictional standards, and issuing decisions and pronouncements which purport to exclude entire industries from the benefits and burdens of the Act. If, notwithstanding these decisions and pronouncements, the Board may thereafter invalidate contracts executed, and treat as unfair labor practices acts performed, in reliance upon such decisions and pronouncements, the result will be to create intolerable conditions of instability and uncertainty in labor relations in the industries affected.

The Board itself, in cases decided since the entry of the decision and order in this proceeding, has recognized that the exercise of such authority, assuming its existence, would be contrary to the objectives and policies of the Act.

In *Compressed Air, Foundation, Caisson, Tunnel, Subway, Sewer, Cofferdam Construction Local Union No. 147 of New York, New Jersey States and Vicinities,* April 26, 1951, 93 NLRB No. 274, the Board held that the discharge of an employee on March 12, 1948, pursuant to a closed-shop contract between a contractor and a construction union was not an un-

fair labor practice, even though, as in this case, the contract was executed before a representative work force had been hired, where the validity of the contract had previously been upheld by the New York State Labor Relations Board acting pursuant to an agreement between that Board and the National Board authorizing the State Board to exercise jurisdiction over construction operations. The National Board said:

> "At all times relevant hereto, the Employer's operations were a part of the building and construction industry. In 1946, at the time of the State Board proceeding, there was in existence an agreement between the National Labor Relations Board and the State Board, reached in 1937, authorizing the State Board to exercise jurisdiction over construction operations in New York State such as those in which the Employer was engaged. Thus, **not only was the State Board the only agency to which the parties could then look for a determination of the validity of their contract and their rights thereunder;** it was also an agency which, in asserting jurisdiction over the employer for the purpose of making such a determination, was acting within the scope of an agreement with the National Board.
>
> "On these facts, we conclude, contrary to the Trial Examiner, that the validity under the Wagner Act of the 1945 closed-shop contract here in issue should not at this time be opened to question by this Board. Unlike the Trial Examiner, we find it unnecessary to decide whether the State Board's action constituted such a final determination of the validity of the contract as

would be binding upon this Board as a matter of law. That action was, at the very least, advice to the parties that their closed-shop contract was valid, which advice was given by a sister governmental agency acting in an area which had been entrusted to it by this Board. **We believe that the policies of the Act and the public interest in stability in labor relations will best be served by holding that, because of the 1937 agreement, the parties were entitled to continue to regard the State Board's action as determinative of the validity under the Wagner Act of their closed-shop contract. Both equity and comity dictate this result.** Because we do not agree with our dissenting colleague that Section 10(a) of the amended Act compels the opposite conclusion, we hold that this Board should not make its processes available to upset a determination made by a sister Board at a time when the latter had full authority to act. Proper respect for that action leads us to conclude that the contract remained a valid basis for the discharge when it occurred, unless subsequent to the effective date of the amended Act it has been renewed or extended, and therefore should be denied the protection of Section 102."

The sole factual distinction between the *Compressed Air* case and this case is that in New York there was a State Labor Relations Board to which the parties could appeal for a determination of the validity of their contract and such Board had ruled in favor of the contract. There was no similar Board in the State of Washington, so that the parties to

the contract of August 16, 1947, had *no* agency to look to for a determination of the validity of the contract. Since the National Board had left them to their own devices, however, they had as much right to assume that their contract was valid as did the parties to the *Compressed Air* contract, and a retroactive determination that the contract was invalid is equally as inequitable and as violative of the policies of the Act as it would have been in the *Compressed Air* case.

In another case, *C. A. Braukman and Lucille Braukman d/b/a Screw Machine Products Company,* June 29, 1951, 94 NLRB No. 234, 28 LRRM 1230, the Board dismissed unfair labor practice charges against an employer arising out of acts occurring at a time when it was refusing to assert jurisdiction over the employer in a representation proceeding, saying:

> "When the complaint issued, the Board was reexamining its policy concerning the exercise of jurisdiction; thereafter, during October 1950, we announced certain specific criteria for the assertion of jurisdiction. It appears, as found by the Trial Examiner, that the Respondent's volume of interstate commerce at about the time the alleged unfair labor practices were committed satisfied the Board's current jurisdictional criteria. **The question thus posed is whether or not the Board should apply retroactively its present jurisdictional standards, and assert jurisdiction in the instant complaint case, although the Board had before and after the commission of the alleged**

unfair labor practices, refused to assert jurisdiction over the Respondent's operations on the basis of then existing standards.

"The Board believes that the question should be answered in the negative. This result is dictated not only by the Board's obligation to respect its own prior decisions, but also by a desire for fair play. It would be inequitable now to hold the Respondent liable for the activities in question, as the Board, almost 2 years ago, in effect advised the Respondent that such activities occurred at a time when 'it would /not/ effectuate policies of the Act to assert jurisdiction' over the Respondent's operations. This ruling imposes no hardship upon the Respondent's employees which they might not reasonably have anticipated, as they engaged in the concerted activities in question after the Board had refused to assert jurisdiction over the Respondent's operations."

The decisions in the two cases above-cited cannot be reconciled with the decision and order in this proceeding. Neither in its Decision and Order nor in its brief has the Board advanced any reason why the retroactive application in this case of the admitted change in its administrative policy of abstention is either equitable or in furtherance of the policies of the Act. Its sole argument in support of the decision and order is that " 'The principles of equitable estoppel [cannot] be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials' " (Brief, p. 18).

Respondent does not claim that the Board's refusal to assert jurisdiction over the building and construction industry constituted "mistaken * * * lack of action". Such refusal was deliberate, intended, and within the authority and discretion of the Board under the Act *(Haleston Drug Stores v. National Labor Relations Board* (9th C.A., 1951), 187 F. (2d) 418). Congress intended, however, that the Board should exercise its authority to assert or to refuse to assert jurisdiction in particular cases in such a way as to effectuate the policies of the Act (see *Haleston Drug Stores v. National Labor Relations Board, supra,* at p. 421). The primary objective of the Act is to achieve stability in labor relations *(Colgate-Palmolive-Peet Co. v. National Labor Relations Board* (1949), 338 U. S. 355, 362, *supra).* Therefore, since as we have shown and the Board has conceded in the cases cited, the retroactive application of the Board's discretionary authority disrupts rather than stabilizes labor relations, it is clear that the Board had no authority or discretion under the Act to apply retroactively the change in its policy of abstention from the exercise of jurisdiction over the building and construction industry.

If it were to be assumed, however, that Congress intended that the Board should have authority to apply this change in administrative policy retroactively, the exercise of such authority would constitute a denial of due process of law in contravention of the Fifth Amendment. Such change in administrative policy, affecting, as it did, an entire industry, was

legislative in character, and under well-settled principles of due process, could not be given retroactive effect so as to invalidate rights previously acquired and impose sanctions for acts to which no sanctions were attached when they were performed.

In *Arizona Grocery v. Atchison Ry.* (1932), 284 U. S. 370, the issue was whether the Interstate Commerce Commission had power to award reparations with respect to shipments which had moved under rates approved or prescribed by it. In holding that the Commission had no such power, the Supreme Court said (p. 389):

> "The Commission in its report confuses legal concepts in stating that the doctrine of res judicata does not affect its action in a case like this one. It is unnecessary to determine whether an adjudication with respect to reasonableness of rates theretofore charged is binding in another proceeding, for that question is not here presented. The rule of estoppel by judgment obviously applies only to bodies exercising judicial functions; it is manifestly inapplicable to legislative action. The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future, it was performing a legislative function, and that when it was sitting to award reparation, it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of res judicata, it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute

> a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."

The principle announced in the *Arizona Grocery* case is analogous to the principle, also well-established, that neither criminal nor civil penalties may constitutionally be imposed under a statute which does not define an offense with sufficient certainty to apprise the persons subject to it of the acts which they are forbidden to perform (*International Harvester Co. v. Kentucky* (1914), 234 U. S. 216, 223; *Small Co. v. Am. Sugar Ref. Co.* (1925), 267 U. S. 233 239; *Cline v. Frink Dairy Co.* (1927), 274 U. S. 445, 465; *Champlin Ref. Co. v. Commission* (1931), 286 U. S. 210, 243). Due process requires that individuals be informed beforehand that particular action is forbidden and will subject them to penalties or other sanctions before such penalties and sanctions may be imposed.

In *Lanzetta v. New Jersey* (1939), 306 U. S. 451, in holding that a criminal statute was void by reason of vagueness and uncertainty, the Supreme Court said (p. 453):

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. *United States v. Reese,* 92 U. S. 214, 221; *Czarra v. Board of Medical Supervisors,* 25 App. D. C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See *Stromberg v. Cali-*

fornia, 283 U. S. 359, 368; *Lovell v. Griffin,* 303 U. S. 444. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. **All are entitled to be informed as to what the State commands or forbids.** The applicable rule is stated in *Connally v. General Construction Co.,* 269 U. S. 385, 391: "**That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.** And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The principle of these authorities is applicable here. Admittedly the Board, by decisions in unfair labor practice cases and by refusal to entertain representation petitions, had advised management and labor in the building and construction industry that it would not assert jurisdiction over that entire industry under the original Act. Under these circumstances, Respondent and the unions with which it dealt had no other alternative than to proceed upon the assumption that the facilities of the Board were closed to them and that the unfair labor practice provisions of the Act did not apply to their operations and transactions. They had vitally important work to do, and they had to get on with it under the rules

which were then in effect. If the Board continued its uniform policy of abstaining from the exercise of jurisdiction over the industry, then the unions had the *right* to demand a closed-shop contract without regard to their representative standing and Local 370 of the Operating Engineers had the *right* to demand the discharge of Chester R. Hewes pursuant to its contract. At the time Respondent complied with these demands, it had to assume that the Board would continue its policy of abstention, since any other assumption would be based upon pure speculation and guess.

We respectfully submit, therefore, (1) that the Act does not authorize the Board to treat as an unfair labor practice the performance of an obligation under a collective bargaining agreement executed at a time when the Board was refusing to assert jurisdiction over the parties, and (2) that in any event, the exercise of such authority in such a way as to nullify rights acquired, and to impose sanctions for action taken, in reliance upon the Board's policy of abstention is an unconstitutional denial of due process of law.

III.

THE ENFORCEMENT OF THE UNFAIR LABOR PRACTICE PROVISIONS OF THE ACT AGAINST PARTIES WHO HAVE BEEN DENIED THE BENEFITS OF THE REPRESENTATION ELECTION PROVISIONS OF THE ACT IS CONTRARY TO THE INTENT OF CONGRESS, AND A DENIAL OF DUE PROCESS OF LAW IN CONTRAVENTION OF THE FIFTH AMENDMENT, PARTICULARLY WHEN THE FINDING OF AN UNFAIR LABOR PRACTICE RESTS UPON A DETERMINATION THAT A BARGAINING UNIT SELECTED BY THE PARTIES IN DEFAULT OF ASSISTANCE FROM THE BOARD WAS "INAPPROPRIATE".

Under the National Labor Relations Act, the Board is charged with two principal functions. One is "the certification, after appropriate investigation and hearing, of the name or names of representatives, for collective bargaining, of an appropriate unit of employees" *(A.F. of L. v. Labor Board* (1940), 308 U. S. 401, 405). The other is "the prevention by the Board's order after hearing and by a further appropriate proceeding in court, of the unfair labor practices enumerated in Section 8" *(A.F. of L. v. Labor Board, supra).*

In *Matter of The Plumbing Contractors Association of Baltimore, Maryland, Inc.,* April 2, 1951, 93 NLRB No. 177, 27 LRRM 1514, the Board held, with respect to the building and construction industry, that Congress did not intend that it should perform the second of these functions, namely, the prevention of unfair labor practices, while it was refusing to perform the first of these functions. It said (27 LRRM 1517):

> "As the Board has pointed out in earlier cases involving the building and construction indus-

try, the legislative history of the amended Act clearly establishes the intent of Congress in 1947 that the Board should assert jurisdiction in that industry for the purpose of preventing certain unfair labor practices by labor organizations. Consistent with that intent, the Board has asserted jurisdiction in unfair labor practice cases arising under Section 8 (b) (4) of the Act, when such assertion was appropriate on the basis of the commerce facts established therein. In addition, however, to proscribing certain conduct by labor organizations, Section 8 (b) (4) excepts from such proscription, or grants certain benefits to, a labor organization which has been certified pursuant to Section 9(c). Section 8(b)(2), when read in conjunction with Section 8(a)(3), grants to a labor organization which has been certified pursuant to Section 9(e)(1) the right to enter into and enforce a union-security contract. If, as we think it must, the Board is to continue in appropriate cases to process complaints and issue cease and desist orders against labor organizations in the building industry, it would be most inequitable for the Board, at the same time, to deny to labor organizations the benefits which accrue from certification when, in appropriate cases, our jurisdiction is invoked. We do not believe that Congress intended that in this industry the Board would wield the sword given it by the Act, but that labor organizations desiring it should be denied the shield of the Act. We believe, rather, that in providing that certain benefits would flow from certification, Congress intended that the shield should go with the sword, and that the Board should to this end

> **assert jurisdiction in representation and union-security authorization cases to the same extent and on the same basis as in unfair labor practice cases.** Unless and until Congress, for reasons of policy, provides otherwise by appropriate legislation, we must proceed on that basis. **We could not take any other course without flouting the will of Congress as now expressed in the 1947 statute.''**

Concededly the Board was not performing the function of issuing certifications in the building and construction industry prior to the effective date of the amended Act. Therefore, under the Board's reasoning in the *Baltimore Plumbers* case—which we submit is sound,—it would be contrary to the intent of Congress, and would not effectuate the policies of the Act, to hold that the performance of an obligation under a collective bargaining agreement entered into in the building and construction industry prior to the effective date of the amended Act constituted an unfair labor practice under section 8 (3) of the original Act. Obviously, such a holding, as we have pointed out in other connections, would create instability rather than stability in labor relations, and it should not be enforced by this Court (see *National Labor Relations Board v. Flotill Products Co.* (9th C.A., 1950) 180 F. (2d) 441; *National Labor Relations Board v. C. W. Hume,* (9th C.A., 1950) 180 F. (2d) 445).

Further, if the Act were to be construed as giving the Board discretion to withhold the ''shield'' from the building and construction industry while wielding

the "sword" therein, such a construction would render the Act void as violative of due process of law. There could be no reasonable justification for such a discriminatory treatment of a single industry. The Act was enacted for the purpose of protecting and preserving the important contract rights flowing from collective bargaining (*Edison Co. v. Labor Board* (1938) 305 U. S. 197, 238). Management and labor in the building and construction industry are as much entitled to the protection of such rights as management and labor in other industries, and the application of the Act to them in such a way as to emasculate these rights without providing any means for protecting and preserving them would constitute discrimination "gross enough * * * as equivalent to confiscation and therefore void under the Fifth Amendment" (see *Hamilton Nat. Bank v. District of Columbia* (App. D. C. 1946) 156 F. (2d) 843, 846, (1949) 176 F. (2d) 624, *cert. den.*, 338 U. S. 891).

IV.

SUCH PORTION OF THE BOARD'S ORDER AS DIRECTS RESPONDENT TO PAY BACK WAGES TO CHESTER R. HEWES IS INVALID AND IMPROPER.

The power of the Board to command affirmative action, such as the payment of back wages, is remedial and not punitive (*Edison Co. v. Labor Board* (1938) 305 U. S. 197, 236). At the time it executed the contract of August 16, 1947, and at the time it discharged

Chester R. Hewes, Respondent reasonably assumed that its action was not violative of the Act or of any other law. Both the Board (R. 53) and the Trial Examiner (R. 86) found that it had acted in good faith. In these circumstances, the fact that the Board has now departed from its original policy of absention insofar as the building and construction industry is concerned should not operate retroactively to subject Respondent to monetary sanctions.

In *Chicot County Dist. v. Bank* (1940) 308 U. S. 371, the Supreme Court, in considering the effect to be given a judicial decision holding an Act of Congress unconstitutional, insofar as concerns rights accruing and actions taken during the period between the enactment date of the statute and the date of the judicial decision of unconstitutionality, said (p. 374):

> "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County,* 118 U. S. 425; *Chicago, I. & L. Ry. Co. v. Hackett,* 228 U. S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. **The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored.** The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as

> to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. **Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.** These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

The administrative policy of the Board in abstaining from the exercise of jurisdiction in an entire industry has "consequences which cannot be justly ignored" (compare *Ford Motor Co.* (1951) 95 NLRB No. 121, 28 LRRM 1371). Persons otherwise subject to the Act must continue their business and other affairs in conformity with the policy then in effect. To thereafter impose monetary sanctions for acts taken in reliance upon the existing policy is contrary to fundamental principles of fair play, and could not possibly effectuate any policy of the Act.

In *National Labor Relations Board v. Don Juan Co.* (1949) 178 F (2d) 625, the United States Court of Appeals for the Second Circuit remanded a proceeding to the Board for a statement of the reasons which led the Board to enter a back pay award not-

withstanding that the discharge involved had been made in good faith. Thereafter the court reported as follows (185 F. (2d) 393, 394):

> "The Board has now considered the effect of good faith on an award of back pay, and has made the following declaration of policy in response to the remand of the proceeding:
>
> " 'We believe that the inherent equities of such a situation require that, whether the discharges were made in good faith or bad faith, the financial loss resulting therefrom should be borne by the Respondents, who committed the illegal acts, not by the two employees who were discharged through no fault of their own. The risk of mistake in construing ambiguous provisions of a supposed union-security contract should reside with the party who misinterprets the contract, rather than with the employees against whose interest the contract has erroneously been thought to run.' "

While an employer may reasonably be said to assume the risk of the erroneous interpretation of an ambiguous contract, since it is within the employer's power to resolve the ambiguity by amendment to the contract, in this proceeding the Board's own administrative policy of abstention left Respondent helpless to protect itself. Therefore the "inherent equities" of the case rest with Respondent, and call for a denial of enforcement of the Board's order insofar as it imposes monetary sanctions against Respondent. "The powers conferred upon this court by the National Labor Relations Act to enforce the orders of the Board are equitable in nature and may be invoked only if the

relief sought is consistent with the principles of equity" (*National Labor Relations Board v. National Biscuit Co.* (3rd C. A., 1950) 185 F. (2d) 123, 124).

We respectfully submit that under the circumstances of this case, such portion of the Board's order as directs the payment of back wages to Chester R. Hewes is not consistent with the principles of equity, and should not be enforced by this Court.

V.

SINCE IT APPEARS THAT CHESTER R. HEWES WOULD HAVE BEEN REHIRED UPON APPLICATION TO RESPONDENT AFTER THE CLOSED-SHOP CONTRACT OF AUGUST 16, 1947, WAS SUPERSEDED BY AN OPEN-SHOP CONTRACT EFFECTIVE AUGUST 10, 1948, SUCH PORTION OF THE BOARD'S ORDER AS DIRECTS RESPONDENT TO PAY BACK WAGES TO CHESTER R. HEWES FOR ANY PERIOD AFTER AUGUST 10, 1948, IS INVALID AND IMPROPER.

The provisions of the closed-shop contract of August 16, 1947, expired on August 10, 1948, and the agreement thereafter in effect between the parties provided for open-shop conditions (R. 163-172). After August 10, 1948, there was no bar to the employment by Respondent of Chester R. Hewes, but he never thereafter applied for employment (R. 172-173).

Respondent urged before the Board (R. 30), and now urges before this Court, that under these circumstances any back pay award (assuming such an award in any amount is proper) should be limited to the period between the date of the discharge on Feb-

ruary 18, 1948, and the expiration date of the closed-shop contract on August 10, 1948. The Board answered this contention with the statement that "It is the employer's duty to remedy a discriminatory discharge by offering reinstatement" (R. 54, n. 15; see Board's Brief, pp. 19-20).

The difficulties and equities of Respondent's position, in view of the Board's original administrative policy of abstention, have already been set out in this brief (*supra,* pp. 20-32). None of the cases cited by the Board in support of its ruling on this point (Brief, pp. 19-20), involved a similar factual situation. Certainly the fact that the discharge of Mr. Hewes may have involved no fault on his part (*National Labor Relations Board v. Don Juan Co., supra)* should not excuse his lack of diligence or indifference subsequent to the expiration of the closed-shop contract, at which time any possible equities in his favor disappeared. The very minimum of the relief to which Respondent is entitled in this Court would be a denial of enforcement of any portion of the award calling for the payment of back wages after August 10, 1948.

CONCLUSION.

While each of the first three points urged in this brief furnishes a separate, distinct and individually sufficient ground for denying enforcement of the Board's order herein, the basic consideration behind each of them is that it would be inequitable to apply

the Board's changed policy toward the building and construction industry retroactively. The Board has not advanced, either in its decision and order or in its brief, any sound reason why such retroactive application would effectuate the policies of the Act. On the contrary, it is clear from the provisions of Sections 102 and 103 of the amended Act that Congress intended that the transition from the original Act to the amended Act should be gradual (see H.R. No. 510, June 3, 1947, 80th Cong., 1st Sess., U. S. Code Cong. Serv. 1947, pp. 1135, 1167), and that none of the provisions of the amended Act should apply retroactively. We submit that the same principle of non-retroactivity should apply to the Board's administrative policies under the Act.

We respectfully submit that the order of the Board is not valid or proper, and that it should not be enforced by decree of this Court.

Dated, San Francisco, California,
September 24, 1951.

GARDINER JOHNSON,
THOMAS E. STANTON, JR.,
Attorneys for Respondent.

(Appendix Follows.)

Appendix.

Appendix

STATEMENT OF ENFORCEMENT POLICY PROPOSED BY GENERAL COUNSEL FOR FORMULATION AND ADOPTION FOR THE GUIDANCE OF THE PUBLIC PURSUANT TO SECTION 3(a)(3) OF THE ADMINISTRATIVE PROCEDURE ACT.

Special considerations peculiar to certain portions of the building and construction industry, including unique employment relationships, bargaining patterns and traditions and unit and eligibility questions have prevented the National Labor Relations Board and the General Counsel of the Board from establishing satisfactory administrative machinery for conducting union security elections as provided by Sections 8 (a) (3) and 9 (e) of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136).

These provisions presuppose some degree of stable employment among the employees whose vote will decide whether their employer and their collective bargaining representative may agree to require membership in the Union as a condition to their continued employment. The building and construction industry, however, is singularly lacking in that degree of stability of employment which is required if elections are to be held under the conventional procedures established pursuant to Section 9 (c) and 9 (e) of the Act. Employment in the building and construction industry differs radically in its nature and duration from that in other industries. As a general rule the building and construction craftsmen work only sporadically for any one employer. Their term of employment is

(1) Will deem the union shop authorization requirements of Section 8 (a) (3) and 9 (e) to have been met, despite the fact that no election may have been held, until such time as administrative machinery has been established and made available to the public;

(2) Will compute the 30-day provisions of Section 8 (a) (3) as satisfied by a showing of total employment for 30 days by any employer or employers, either singly or in the aggregate, in the unit covered by the collective bargaining contract containing the union security provision; and

(3) Will process in normal fashion all cases which, despite the considerations set forth in paragraphs (1) and (2) above, involve violations of any of the unfair labor practice sections of the Act.

This policy will apply only to those situations within the industry where, because of the difficulties heretofore described, it is administratively impracticable to conduct an election pursuant to Section 9 (e) of the Act, and where the union has fully complied with the filing requirements of Section 9 (f), (g) and (h) of the Act. It does not apply to those situations where employment is sufficiently stable to permit the conduct of elections. Nor does it apply to that type of conduct with respect to union security which is outside the allowable area defined in the proviso to Section 8 (a) (3) of the Act and which would be within the prohibition of Sections 8 (a) (3) and 8 (b) (2) notwithstanding actual union security authorization.

NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

Immediate release
Tuesday, June 6, 1950 (R-326)

STATEMENT OF N.L.R.B. POLICY ON BUILDING CONSTRUCTION INDUSTRY.

The National Labor Relations Board today issued the following statement of its unanimously-adopted policy in the building construction industry:

Some time ago the General Counsel announced that, because of certain widely-recognized difficulties which flow from the character of employment relations in the building construction industry, he would not seek to enforce the union-shop provisions of the Taft-Hartley Act there as fully as he would elsewhere. The Board appreciates the General Counsel's persistent efforts to find a solution of these problems, which lie far more within his statutory and delegated jurisdiction than within ours.

Yet we cannot join in so much of the General Counsel's proposed policy as would tend to vary or nullify the plain language of the present statute, no matter how tempting practical considerations might make that course. We find no authority to take such a step, especially in the light of the Supreme Court's admonition in the recent *Colgate-Palmolive-Peet* decision.

> "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the

> Board's policy * * *. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress."

Assuming that we are to continue to exercise jurisdiction over the building construction industry, and yet that some of the union shop provisions of the Act cannot be made to work there, it is our duty to report that fact to the Congress, rather than to change the law ourselves by administrative exemption of a single industry.

Of course, so long as the General Counsel thinks it fairest and best to exercise his exclusive discretion by declining to issue complaints of unfair labor practice if employees are discharged pursuant to an unauthorized union-shop contract, the Board could not, if it would, conduct a hearing or find a violation of law. If and when, however, any such case reaches the Board Members for decision, we will have no choice but to enforce the law as written.

No. 12880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GUY F. ATKINSON CO., a Corporation, and J. A. JONES CONSTRUCTION CO., a Corporation,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

Amicus Curiae Brief of Local 370, International Union of Operating Engineers, AFL

SHAW & BORDEN CO. 3D4057

FILED
SEP 24 1951

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No. 12880

IN THE

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Petitioner,

vs.

GUY F. ATKINSON CO., a Corporation, and J. A. JONES CONSTRUCTION CO., a Corporation,

Respondent.

SUPPLEMENTAL STATEMENT OF THE CASE

The National Labor Relations Board has found that the respondent employer, Guy F. Atkinson Co. and J. A. Jones Construction Co., violated Section 8 (a) (3) and (1) of the Act by discharging Chester R. Hewes in accordance with the provisions of a closed shop contract entered into by Respondent and Local 370, International Union of Operating Engineers, AFL, hereinafter referred to as Local 370. Further, the National Labor Relations Board found that Respondent violated Section 8 (a) (1) of the Act by reason of rendering illegal assistance to the Operating Engineers (R. 54). Upon the facts surrounding the operations of Respondent at the Hanford Atomic Energy Works, the Board found that these operations constitute activities affecting commerce within the

purview of the Act and further determined that it would effectuate the policies of the Act for the Board to exercise jurisdiction in this case (R. 48-49, 67), stating further that its abstention from exercising jurisdiction over the construction industry was a matter of administrative choice under the National Labor Relations Act rather than a legal necessity.

Pursuant to the terms of the construction-collective bargaining agreement executed on August 16, 1947 (R. 149-150), Hewes was released from employment with Respondent pursuant to the request of Local 370 (R. 74-75, 143, 161, 179).

The Board then determined the discharge of Hewes to be violative of the Act, asserting that Local 370 could not have been the representative designated by a majority of employees in an appropriate bargaining unit as required by the proviso to Section 8 (3) of the Act, and therefore the collective bargaining agreement was illegal and the discharge of Hewes in violation of Section 8 (a) (3) and 8 (a) (1) of the amended Act. Further the Board found that Respondent gave illegal assistance to Local 370 in violation of Section 8 (a) (1) of the Act by contracting with Local 370 at a time when no showing had been made that Local 370 represented a majority of the operating engineers working for Respondent, and by requiring its operating engineer employees to become and remain members of Local 370 in good standing.

SUMMARY OF ARGUMENT OF LOCAL 370

I.

The Board erred in finding that Respondent discriminatorily discharged Hewes in violation of Section 8 (a) (3) and 8 (a) (1) of the Act by reason of the fact that the closed shop agreement between Respondent and Local 370 constitutes an adequate defense to the discharge of Hewes.

II.

Enforcement of the Board's order would not effectuate the express purposes of the Act and be violative of the congressional mandate in that it would serve to disrupt the orderly pattern of labor relations in a large segment of industry rather than promote stability and order in dealings between management and labor.

III.

The Board's order is violative of the intent of the Congress and represents a denial of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

ARGUMENT

I.

The Board erred in holding the discharge of Hewes to have been discriminatory and in violation of Section 8 (a) (3) *and* 8 (a) (1) *of the Act.*

The position taken by the Board in support of its contention that the discharge of Hewes constitutes a violation of Section 8 (a) (3) of the amended Act is roughly that the proviso of Section 8 (3) of the Act has no application in the present instance because it would have been impossible for the employees of Respondent to have made a democratic selection of their representative at a time when the Respondent did not have a representative complement of employees within the operating engineer categories in his employ. The Board's position assumes that at some time during the operation of the construction project payroll expansion would have reached a point where it would have been proper for the Board to process an election for union representation upon petition. The position thus taken by the Board, however, flies in the face of realism when applied to the construction industry. The ex-General Counsel of the National Labor Relations Board, Mr. Denham, has recognized the facts of peculiar circumstances obtaining to the construction industry in his testimony before the Joint Congressional Labor Committee, Page 64, wherein he stated as follows:

"The construction industry as far as this is concerned presents a problem which is quite different from the problem that is found in a fixed employment industry. The fluidity of the employment, temporary nature of the job and all of these things have required that we approach that from a wholly different angle. If you try to set up an election on a construction job and you take it as it is today and hold an election next week, there is grave danger of finding at least a large percentage of employees who are on that job will be gone and will be someplace else doing something else. * * *

"You cannot vote them by jobs because the jobs are so unstable."

At the time of the execution of the August 16, 1947, collective bargaining agreement there existed no possibility of obtaining Board action in determining whether or not Local No. 370 was the appropriate bargaining representative of any categories of manual employees at Hanford Works, nor was it possible to ascertain the exact scope of the work which Respondent would be required to do on the project and the numbers of workmen necessary to staff the contract requirements (R. 191-192).

It may be argued further that the Board erred in finding the contractor at fault for recognizing Local 370 as the proper collective bargaining agent for its several members employed by the contractor at Hanford Works at the time of the signing of the August 16, 1947, collective bargaining agreement. Testimony

was elicited at the initial hearing that a number of members of Local 370 were employed by the contractor at the date the August 16 agreement was signed (R. 187). Actually, at the date of the signing of the August 16 agreement there were on the payroll of the contractor ten manual employees, members of International Union of Operating Engineers, Local 370, all of whom had designated Local 370, International Union of Operating Engineers, as their authorized collective bargaining agent.

> (Bargaining authorizations for all ten of these individuals were obtained at the time of their application for membership in the International Union of Operating Engineers. The records of two individuals who were initiated into locals other than Local 370 are unobtainable.) (See appendix.)

Upon inquiry by the Board with regard to the designation of bargaining authority on the part of these employees of the contractor, it might properly have been found that they constituted an appropriate unit and were currently being represented in collective bargaining by Local 370. The fact, however, stands out that at the time the Board made no such inquiry, but continued to pursue its practice of abstaining from exercising its jurisdiction over the building and construction industry, which policy it had pursued from the inception of the National Labor Relations Act in 1935.

Further inquiry on the part of the Board would have disclosed that at the date of the execution of the col-

lective bargaining agreement of August 16, 1947, a closed-shop pattern of bargaining (R. 188) with the Associated General Contractors of America, Spokane Chapter, had existed for a period of many years throughout the area of eastern Washington and northern Idaho, of which the Hanford Project is a part; that the Associated General Contractors, Spokane Chapter, had recognized the right of Local No. 370 to bargain for its members in the area covered for a like period of years; that both of the corporate entities comprising the joint venture of Atkinson-Jones Construction Company had been and were at the time members of the Associated General Contractors of America; that members of any Chapter of the Associated General Contractors doing work in an area other than that of their immediate affiliation are expected to abide by the wage scales and working conditions imposed by Associated General Contractors collective bargaining agreements applicable to the area in which the work is to be done; that further the wage scales presently established in 1947 pursuant to the collective bargaining agreement executed by the Operating Engineers with the Associated General Contractors of America, Spokane Chapter, were recognized as controlling and applicable to work done on the Hanford Project by the Davis-Bacon Section of the Department of Labor, and lastly that the need for a separate "job contract" covering the operations of the contractor on the Hanford Works arose solely by reason

of the peculiar nature of the work and exigencies of security, which required employees of the contractor to travel long distances within secured and barricaded areas in order to arrive at the site of their work, and that unusual protective measures were required to be enforced because of the potential physical hazard inherent in operations undertaken at or near areas of possible radioactive contamination.

It is also averred that the Board was remiss in not making a more substantial inquiry into the actualities of the bargaining authorizations, which had been granted to Local No. 370 by the individual employees of the contractor at the time the collective bargaining agreement of August 16, 1947, was entered into. At that date there were in the employ of the contractor at Hanford Works ten individuals doing work within the generally recognized jurisdiction of International Union of Operating Engineers, all of whom were members of the International Union of Operating Engineers, and each of whom had signed bargaining authorization cards designating International Union of Operating Engineers as his bargaining representative.

It has been pointed out in testimony (R. 189-190) that the employer was required by contract and the exigencies of the emergency construction program at Hanford Works to begin work as soon as possible and to staff the job to the utmost of its ability with competent workmen immediately. Further that the em-

ployer as a heavy construction contractor engaged in substantial contract activities on the west coast throughout a period of years relied upon the union organizations possessing the skilled members in occupational categories, which it thought it would need in completing its contract. Pursuant to its expressed practice, therefore, the employer on August 16, 1947, had in its employ ten manual employees, members of Local No. 370, consisting of two power equipment operators, five bulldozer operators, one motor patrol operator and two heavy duty mechanics, all of whom had designated International Union of Operating Engineers as their respective bargaining agent. This fact might have been disclosed by inquiry on the part of the Board, but by reason of its then current policy of abstention from exercising jurisdiction over the construction industry as such, no inquiry was ever made.

Assuming arguendo that the Board might realistically have accepted either of the two types of bargaining units (discussed above) as being appropriate, had it then exercised jurisdiction over the construction industry, there remains still another factor in the history of the collective bargaining agreement of August 16, 1947, which should rightfully have been considered by the Board as bearing upon the appropriateness of units described in the agreement itself. The record discloses (R. 176, 180) that Respondent following the traditional practice of the industry arranged a negotiational meeting at Spokane, Washington, with

> "several component unions of the Pasco Building and Construction Trades Council, with certain other International unions affiliated with the Building and Construction Trades Department of the American Federation of Labor" (R. 176)

which meeting was arranged

> "through the agency of Mr. Harry Ames, who is Executive Secretary of the Washington State Department of the Building Trades and Construction Department of the American Federation of Labor" (R. 180-181).

It may thus be contended that the Respondent recognized that de facto control over the skilled labor supply which it would need to man its project at Hanford Works resided in the Pasco Building and Construction Trades Council and in the component unions thereof.

With regard to Local No. 370, International Union of Operating Engineers, therefore, any one of three units might have been recognized as advancing "the policy of efficient collective bargaining."

1. All Operating Engineers within the geographical area covered by the Associated General Contractors of America's collective bargaining agreement of February 28, 1947.

2. All Operating Engineers employed on the project at Hanford Works on August 16, 1947, or to be employed thereon in the future, it having been demonstrated that members employed at that date had granted bargaining authorization to Local 370.

3. Local 370 as a member of the Pasco Building and Construction Trades Council enjoyed recognition as the representative of Engineers in an appropriate unit within the geographical area of that Council. It may further be noted to the Court's attention that the Council type of collective bargaining is common within the construction industry, particularly when applied to jobs in isolated areas. Collective bargaining agreements covering all construction employers on the Arco (Idaho) Atomic Energy site, also within the jurisdiction of Local 370, have been made with the Pocatello Building and Construction Trades Council, and have proven satisfactory both to the employers and labor organizations concerned.

The history of collective bargaining between the Respondent and Local 370, leading up to the collective bargaining agreement of August 16, 1947, indicates that both the employer and the union recognize that each or all of the aforementioned units were appropriate for purposes of their bargaining. It is incredible that according to its expressed standards the Board could find otherwise if it chose (*Pittsburg Plate Glass Co. v. N. L. R. B.,* 313 U. S. 146, 165), but inasmuch as the Board had through its policy of administrative abstention never made such a decision in the construction industry (*Johns-Manville Corporation,* 61 N. L. R. B. 1), it is academic to argue that the Board might or might not have determined one or all of these three units to be appropriate and if a decision on this point

were reached, as to whether it could feasibly hold an election.

It is therefore both inappropriate and unrealistic for the Board at a much later date to apply retroactively criteria for determining appropriate bargaining units which were not, by the Board's admission, practical or available at the time the initial agreement was signed and which criteria when applied retroactively threaten to deprive both labor and management within the construction industry of the benefits of a practice which was sanctioned and encouraged by the National Labor Relations Board itself.

II.

Enforcement of the Board's order would disrupt the orderly pattern of bargaining in the construction industry and do violence to the express purposes of the Act.

The Board erred in not giving due consideration to factors inherent in the construction industry, which have been recognized in practical application not only by the construction contractors and the several construction labor organizations serving them, but the Board itself.

In the interest of clarification and at the risk of apparent digression, the essential function and raison d'etre of the heavy construction union is to supply contractors with whom it has executed a collective bar-

gaining agreement with manual employees competent to perform the work required of them.

With regard to its own individual membership, the local union acts as a clearing house or intermediary between the contractors themselves and the individual members of the union. Inasmuch as the normal construction job is of short duration, it is, as a practical matter, nearly impossible for the average manual craftsman to forecast his job opportunities for a period of more than a few weeks or months at the most. At the conclusion of work on a job which may provide only a short term of employment, in the absence of a labor clearing house such as provided by the construction union, it would be necessary for the individual craftsman, particularly in areas of sparse population, to spend a considerable period of time, and travel over an enormous territory in an effort to find new employment suited to his skill. As a union member, however, it is usually only necessary for the individual member to phone or to write the central dispatching agency of his local organization or to contact one of its several field representatives in order to obtain new employment within a period of days.

Reciprocally, the construction contractor having completed one job finds it economically unfeasible to retain on his payroll all of the craftsmen which he will need to staff his next contract (R. 185). In the case of Local 370, it is entirely possible for a skilled mem-

ber to have worked in the area of southern Idaho for a period of two weeks, to have then been dispatched to a job in eastern Washington more than seven hundred miles away for a period of a week or less, to have then been redispatched to a further and different job in northern Idaho, three hundred miles distant, never having left the territorial jurisdiction of Local 370. Further, by virtue of the area-wide agreements which exist within Local 370's territory, it is possible for the craftsman to anticipate stable wages and working conditions before going to work on a job to which he is dispatched. On the other hand the contractor is also assured of a ready supply of skilled craftsmen which he may request from the union by virtue of his collective bargaining agreement with them. He also has a further assurance of stability in wages and working conditions for the fixed period of the collective bargaining agreement and is therefore placed in a position where he may bid for new work with complete foreknowledge of his labor costs, and knowledge that job grievances will not impede his work.

In the particular circumstances surrounding the activation of the construction program at Hanford Works, Respondent was placed in a position where it was necessary for it to procure workmen at once. The exigencies of the construction program were such as to require only the highest skills; the numbers of craftsmen eventually to be employed upon the project were forecast to be tremendous and in actual effect

during the peak of construction amounted to over 16,000 construction workers in all categories of manual employment. In the case of the Operating Engineers, the area immediately surrounding the Hanford Works would not have been able to provide more than a very small fraction of the skilled operators required for the initial phases of the project alone.

As has been pointed out previously, the economic symbiosis existing between the construction contractor and the construction trade unions has developed such that far from relying upon the construction craft union as its most reliable and efficient source of labor, the construction contractor has recognized the construction labor organization as being the sole procurement agency through which it might obtain the proper skills in sufficient numbers to fulfill its contract commitments on a large job. Such was the case and Respondent's position on August 16, 1947. As soon as the skilled manpower requirements of the job could be forecast with any accuracy by the Respondent, Local 370 was required to draw from throughout its entire membership, at that time being in excess of 3,000 men, in order to obtain the requisite skills at the required time. Such was the size and urgency of the project as it was first envisioned in 1947 that on many occasions calls for particular categories of craftsmen which were in short supply in the northwest were made by telephone as far as the eastern seaboard, the men thus called quite occasionally flying immediately to the job in order that

the construction program might not be impeded in any way.

It is a matter of agreement on the part of the contractors as evidenced in part by their collective bargaining practices, that the several A. F. of L. construction craft unions have in the northwest a virtual monopoly of the skilled labor required by those contractors. Nor may it be successfully contended that this practice of collective bargaining has arisen from any causes other than those of mutual convenience and necessity. The construction contractor has jobs to let; the skilled craftsman has his skill to sell. The union, by virtue of its collective bargaining agreement, serves as the catalytic agent to bring about the fusion of the needs of both contractors and workmen.

The foregoing discussion has not been addressed to the Court for the purpose of attempting to justify a method of procedure within the construction industry on the basis either that it has been historically recognized or is expedient for both labor and management, but is called to the Court's attention for the sole purpose of demonstrating to the Court that the Board erred in failing to recognize that industry practice which had been sanctioned by its policy of abstention from accepting jurisdiction over the construction industry. Failure to take cognizance of its own policy and the reliance of the industry thereon by the Board has resulted in an inequity and represents an arbi-

trary and capricious exercise of the administrative authority granted the Board.

The Board having chosen as a matter of administrative discretion not to exercise jurisdiction over the construction industry under the original Act in any instance, both Respondent and Local 370, confident that the Board's expressed policy would continue to obtain, in all good faith entered into the collective bargaining agreement of August 16, 1947, in accordance with the historically accepted practice of the industry (R. 181, 187 through 188).

Subsequent to the time when the Board declared that it would exercise jurisdiction over the construction industry with reference to representation and union authorization petitions, it continued, however, to withhold from both Local 370 and Respondent recourse to the procedures for the determination of representatives expressed in the amended Act (R. 198, 199, 200-203).

The Board has recently recognized that in equity and good conscience it should not penalize parties to collective bargaining agreements while at the same time withholding from them the benefits guaranteed by the Act which might allow them to avoid the imposition of the penalty. In the first instance of its kind in sixteen years, the Board directed a certification election and a union shop authorization election in a

single-craft unit of the building and construction industry. In the language of the Board:

> "The shield should go with the sword * * *. If the Board is to continue to in appropriate cases process complaints and issue cease and desist orders against labor organizations in the building industry, it will be most inequitable for the Board at the same time to deny the labor organizations the benefits which accrue from certification." (Plumbing Contractors Association of Baltimore, 93 N. L. R. B. 177. (See also) Plumbing and Heating Contractors Association of Olean, New York, 93 N. L. R. B. 176).

In the meantime, however, its delayed recognition has resulted in a deep-seated disturbance within the construction industry, which arose by reason of the fact that the Board's policy was directed toward enforcement of the punitive portions of the Act, nevertheless withholding recourse to the beneficial. The pious expressions of the Board noted above merely point to the recognition by the Board of its own fault. Neither the Respondent nor Local 370 can draw anything but the most inconsequential solace from the Board's change of heart at such a late date.

III.

The Board's order violates the intent of Congress and represents a denial of due process of law guaranteed by the Fifth Amendment.

At the time of the execution of the collective bargaining agreement of August 16, 1947, at the time of

the discharge of Chester R. Hewes by Respondent on February 19, 1948, at the request of Local 370, and at the time the order in the instant Case was issued by the Board, the Board continued as it had since the inception of the National Labor Relations Act to abstain from asserting jurisdiction over the construction industry.

Good faith efforts were made on the part of Engineers Local 370, as well as other local unions similarly situated as signatories to the Hanford Works collective bargaining agreement, to utilize the procedures guaranteed by the Act in defense of their respective collective bargaining positions during and throughout the year 1948. The Board declined to process representation petitions by virtue of its continued refusal to assert jurisdiction over the construction industry.

The Board's order, therefore, represents the first assertion of its complete reversal of administrative policy, thereby nullifying both rights and obligations which the parties have been led to rely on by virtue of the Board's policy, as previously asserted. To this extent, therefore, the Board's order is an arbitrary and capricious exercise of its administrative authority, and is violative both of the intent of Congress and of the rights guaranteed by the Fifth Amendment of the Constitution of the United States.

CONCLUSION

It is respectfully submitted that the Board's order and findings by completely disaffirming the Board's past practice, upon which substantial rights and obligations rest, are shown to be unmindful of the intent of the Congress and improper as unsupported by sufficient evidence on the record considered as a whole.

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September 1951.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151 *et seq.*) are as follows:

Unfair Labor Practices

Sec. 8. It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in

such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce

employees in the exercise of the rights guaranteed in Section 7; * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:

* * * * *

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not

make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

Hoisting and Portable Local Union No. 370-B

AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

TO WHOM IT MAY CONCERN:

I hereby designate the INTERNATIONAL UNION OF OPERATING ENGINEERS and its subordinate Hoisting and Portable Engineers Local Union No. 370 to represent me for the purpose of collective bargaining and in any and all other situations that may arise under the operation of the National Labor Relations Act and/or with any individual employer where the provisions of the National Labor Relations Act are not invoked.

Name David C Buchanan

Street 11 - South 10th St.

City or Town Yakima

State Wash.

(It is not necessary for a Local Union, in order to be designated as a representative, to be located in the community in which controversy arises.)

Hoisting and Portable Local Union No. 370-B

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Name Kenneth M Buck

Street Route 2

City or Town Kennewick

State Wash.

(It is not necessary for a Local Union, in order to be designated as a representative, to be located in the community in which controversy arises.)

OMP... Keith L.

Hoisting and Portable Local Union No. 370B

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Name Keith L. Compton

c/o Tom O'Hara Street W. 1124 - Spofford

City or Town Spokane,

State Wn.

(It is not necessary for a Local Union, in order to be designated as a representative, to be located in the community in which controversy arises.)

URTEAU, Orel

Hoisting and Portable Local Union No. 370-B

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Name Orel Courteau

Street 2703 N. Division

City or Town Spokane

State Washington

(It is not necessary for a Local Union, in order to be designated as a representative, to be located in the community in which controversy arises.)

EWELL, Byron

Hoisting and Portable Local Union No. 370

AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

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Name Byron Grewell

Street Rew Bldg

City or Town Pasco

State Wash

(It is not necessary for a Local Union, in order to be designated as a representative, to be located in the community in which controversy arises.)

IN

Hoisting and Portable Local Union No. 701

OF THE

INTERNATIONAL UNION OF OPERATING ENGINEERS

CITY Portland STATE Oregon

July 11 1946

GENTLEMEN: Having formed a favorable opinion of your Union, I hereby make application to become a member thereof and if accepted I agree as follows: That I will remain a member until expelled; that I will not violate any of the provisions of the Constitution, Rituals, By-Laws, Customs, Rules, or Mandates of the order; that I will not enter into or sign any individual contract of employment with any person, firm or corporation, or any contract or agreement which provides for the withdrawal of my membership from this Union; I further agree in the event of a claimed grievance against the Union to faithfully observe the procedure of, and fully accept as final the findings of the Trial Boards within the order, and I hereby expressly waive any right to institute proceedings in any court of law or equity against the Union; I further agree to conform to and abide by all laws, rules and regulations and orders stipulated in the Constitution and By-Laws, or given by those in authority.

NAME P. E. Woodward DATE OF BIRTH July 20 YEAR 1903

RESIDENCE 236 S. Central CITY Medford STATE Ore

EMPLOYED BY

I also agree to pay an entrance fee of $ 12 which shall include 2 months dues in advance. I further agree that this entrance fee shall be fully paid by 19

Recording Secretary Signature P. E. Woodward

NGSTVEDT, Harold W.

Hoisting and Portable Local Union No. 370-B

AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

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Name Harold W. Kongstvedt

Street

City or Town

State

(It is not necessary for a Local Union, in order to be designated as a representative, to be located in the community in which controversy arises.)

TH, Bert

Hoisting and Portable Local Union No. 370-B

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Name Bert Smith

Street

City or Town

State

(It is not necessary for a Local Union, in order to be designated as a representative, to be located in the community in which controversy arises.)

No. 12880

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GUY F. ATKINSON CO., A CORPORATION, AND J. A. JONES CONSTRUCTION CO., A CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
DOMINICK L. MANOLI,
Attorney,
National Labor Relations Board.

FILED
OCT 2 0 1951
PAUL P. O'BRIEN
CLERK

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

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GUY F. ATKINSON CO., A CORPORATION, AND J. A. JONES CONSTRUCTION CO., A CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. The tenor of respondent's argument under Point I of its brief (pp. 10–34) is, in substance, not that the Board has erroneously interpreted the controlling provisions of the Act but that the Board's application of these provisions to the instant case is "unrealistic" and "unworkable" because of the character of employment relations in the building construction industry. But, as both the Board (see p. V of appendix to respondent's brief) and the Supreme Court have pointed out, it is neither within the province of the Board nor of the courts to vary or nullify the legislative purpose as reflected in the statute no matter how compelling practical considerations might make that course. As the Supreme Court stated in *Colgate-*

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Palmolive Peet Co. v. *N. L. R. B.*, 338 U. S. 355, at p. 363:

> It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy * * * To sustain the Board's contention [here respondent's contention] would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress.

As we have pointed out in our main brief, Congress enacted no qualification, and insofar as the Act or its legislative history discloses, intended none, to the requirement of the proviso in Section 3 of the original Act based upon the employment relations in the construction industry or any other. Respondent's argument should appropriately be addressed only to Congress and not the Board or the courts.

Indeed, Senator Taft, co-author of the amended Act, recently took note of the considerations similar to those urged here and has introduced a proposed amendment to the Act (S. 1959, 82d Cong.; 1st sess.) exempting the construction industry from requirements such as that applied here by the Board so that "an agreement may be made by contractors with a building trades [union] before the initiation of a job and before, therefore, there are any employees who can vote to make any particular union a representative of those employees." 93 Cong. Daily Rec. 9888. But until Congress has acted in accordance with Senator Taft's proposal, the statute must be construed as it reads, without any distinction upon the basis here

urged by Respondent. That, in fact, is the essence of the Supreme Court's holding in the *Colgate-Palmolive-Peet* case, *supra.*

2. Respondent asserts under Point II of its argument (pp. 34–44) that the Board's decision in the instant case represents a denial of due process because it retroactively imposes sanctions upon respondent for action taken in reliance upon the Board's former policy of abstaining from asserting jurisdiction over the construction industry. Because of that policy, respondent asserts, it and the union had the *right* to enter into the agreement of August 16, 1947, and both parties had the *right* to terminate Hewes' employment on the basis of that contract. This contention is manifestly without merit. The contention presupposes that action taken by employers or unions is lawful if the Board declines to assert jurisdiction over the parties and thereby refrains from enforcing the Act with respect to these parties, even though, as here, that abstention is based upon administrative choice and not upon legal necessity. Plainly, abstention based upon such considerations does not confer a *right* upon the parties to do what the Act declares to be illegal nor can that abstention be converted into affirmative approval or validation of action otherwise violative of the Act. The case therefore presents no retroactive nullification of "rights." *N. L. R. B.* v. *Baltimore Transit Co.,* 140 F. 2d 51, 55 (C. A. 4), certiorari denied, 321 U. S. 795; *Local Union 12* v. *N. L. R. B.,* 189 F. 2d 1, 5 (C. A. 5). This Court rejected a similar contention in *N. L. R. B.* v. *Townsend,* 185 F. 2d 378, 383.

circumstances there is in the instant case a total absence of the equitable considerations which prompted the Board to dismiss the complaint in the *Braukman* case. In the *Kenny* case, *supra*, the Board dismissed the complaint against an employer because the contract which formed the basis thereof had been previously adjudicated to be lawful by the New York State Labor Board which had asserted jurisdiction in the matter pursuant to the then existing agreement between it and the National Board. The Board, out of considerations of equity and comity, concluded that the employer should not be penalized under the Act for acting on the basis of a contract previously determined to be lawful by a state agency which had full authority to act in the matter. The instant case plainly presents no comparable situation.

Respectfully submitted.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
DOMINICK L. MANOLI,
Attorney,
National Labor Relations Board.

OCTOBER 1951.

U. S. GOVERNMENT PRINTING OFFICE: 1951

No. 12880

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

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GUY F. ATKINSON CO., A CORPORATION, AND J. A. JONES CONSTRUCTION CO., A CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
DOMINICK L. MANOLI,
Attorney,
National Labor Relations Board.

FILED

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PAUL P. O'BRIEN
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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

The National Labor Relations Board respectfully petitions the Court for a rehearing of the Court's decision entered on February 29, 1952.

The Court set aside as arbitrary and capricious "so much of the [Board's] order as requires Hewes' reinstatement * * *." The order in this respect required respondent to offer Hewes reinstatement and to make him whole for any loss of pay caused by his discriminatory discharge from the date of his discharge to the date of respondent's offer of reinstatement.

The Court's decision is bottomed upon the ground that since respondent discharged Hewes prior to any announcement by the Board that it would no longer, as it had in the past, adhere to its administrative

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policy of declining to assert jurisdiction over employers in the construction industry, the Board's order worked upon respondent, who was "innocent of any conscious violation of the act, and who was unable to know, when it acted that it was guilty of any conduct of which the Board would take cognizance," a "hardship altogether out of proportion to the public ends to be accomplished."

We believe that, consistent with the views expressed by the Court, the reinstatement and back pay order should have been enforced, limited however to the period from either the date on which the Board first announced that it would assert jurisdiction over employers in the construction industry or the date on which the complaint herein was issued against respondent. The order, so modified, we submit, would be both appropriate and equitable.

As the Court noted in its opinion, the Board's first official pronouncement that it would no longer abstain from asserting jurisdiction over employers in the construction industry was made in *Ozark Dam Constructors,* 77 N. L. R. B. 1136, which was decided on June 11, 1948, approximately four months after the discharge of Hewes. The complaint against respondent, alleging that respondent unlawfully discharged Hewes on February 15, 1948, and had since that date unlawfully refused to reinstate him, was issued on September 28, 1948 (R. 6–12). Respondent was thus put on notice either on June 11, 1948 or September 28, 1948, that the Board would no longer adhere to its administrative policy of abstention but would assert jurisdiction over employers in the con-

struction industry. In these circumstances, we submit that here, as in the *Baltimore Transit* case, cited with apparent approval by this Court, "there is nothing unreasonable in requiring the company to undo the effect of unfair labor practices allowed to continue" after respondent had notice that it would no longer enjoy administrative immunity from the sanctions of the Act. *N. L. R. B.* v. *Baltimore Transit Co.,* 140 F. 2d 51, 55 (C. A. 4), certiorari denied, 321 U. S. 795, enforcing 77 N. L. R. B. 109, 112, 113. On this basis, we submit the only limitation that should be put upon the order is to make it operative from and after the date that respondent had notice of the change in the Board's administrative policy, either the date of its decision in the *Ozark Dam Constructors* case or the date of the issuance of the complaint. Such a limitation avoids the inequity or hardship of "retroactive policy making" upon an employer "who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance * * *."

Moreover, the order, as so modified, would give recognition to the inherent equities of the instant case. As between Hewes, who was discriminatorily discharged in violation of the Act and respondent who, howsoever unwittingly, unlawfully terminated his employment, the financial loss, at least from the date respondent had notice of the Board's change of policy, should be borne by respondent who committed the illegal act rather than by Hewes whose statutory rights were invaded. Cf. *N. L. R. B.* v. *Don Juan,* 185 F. 2d 393, 394 (C. A. 2).

Enforcement of the order, modified as here suggested, avoids, we believe, "the rigidities of an either-or rule" and conforms with the Congressional mandate with respect to reinstatement and back pay orders "to attain just results in diverse, complicated situations." *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 199.

For these reasons, it is respectfully submitted that this petition for rehearing be granted limited to the issue raised herein, and that upon such rehearing, the Court enter a decree enforcing the reinstatement and back pay provisions of the Board's order with the qualification stated above.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
DOMINICK L. MANOLI,
Attorney,
National Labor Relations Board.

MARCH 1952.

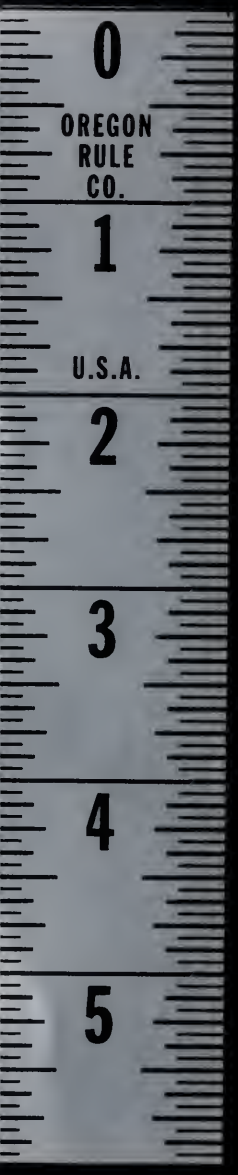
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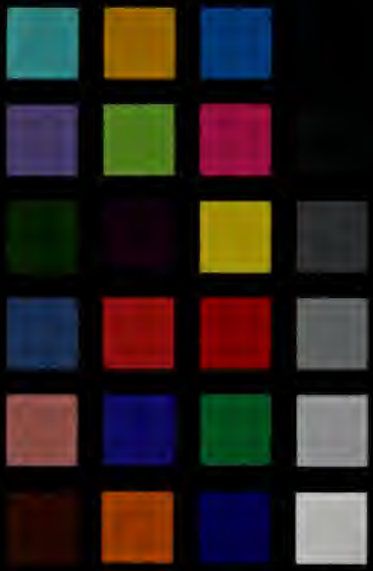
Comes now A. Norman Somers, Assistant General Counsel of the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition, that in his judgment it is well founded and that it is not interposed for delay.

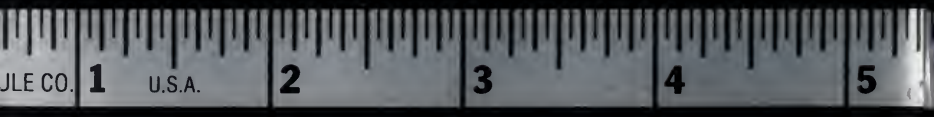
A. NORMAN SOMERS,
National Labor Relations Board.

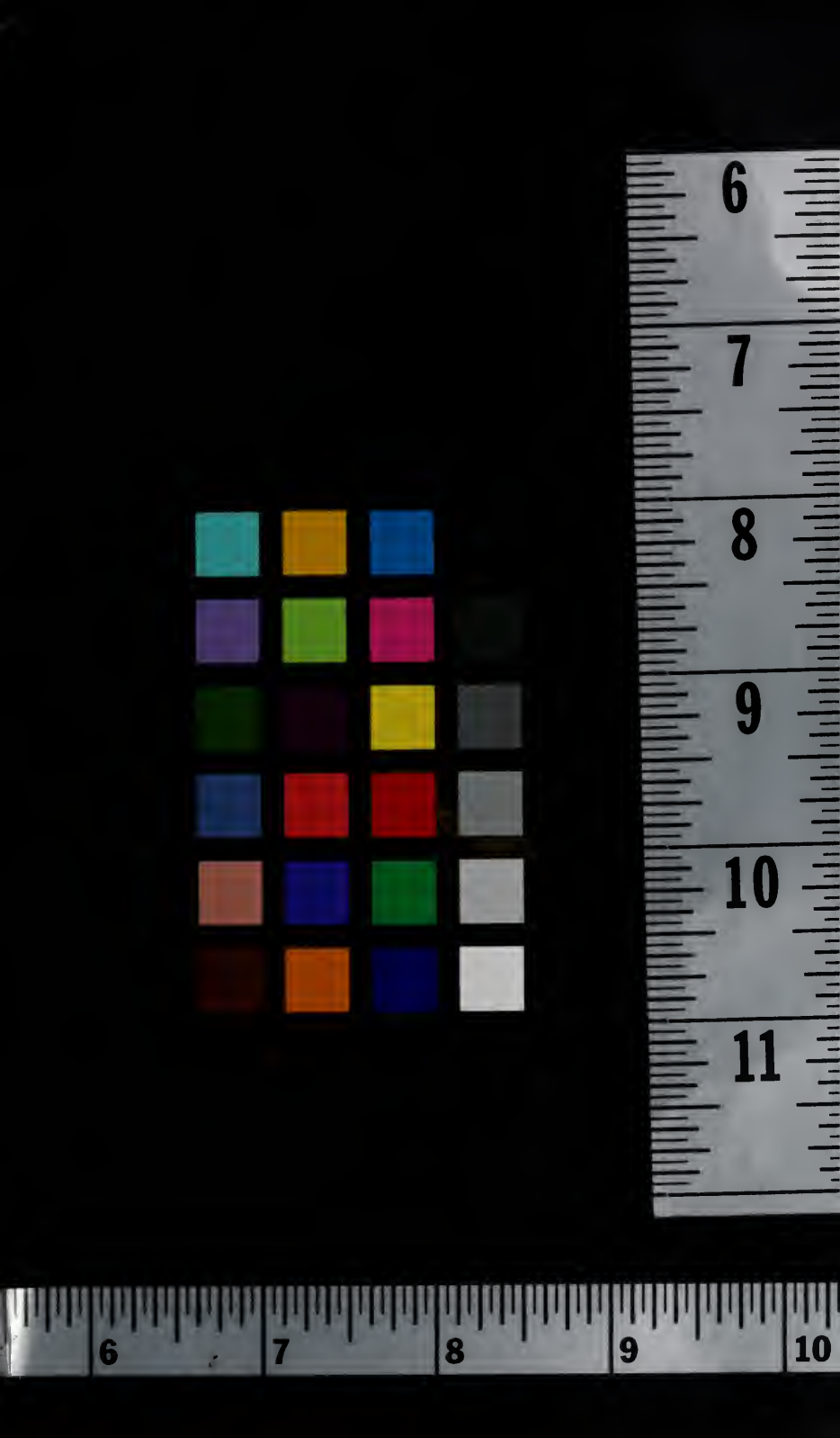
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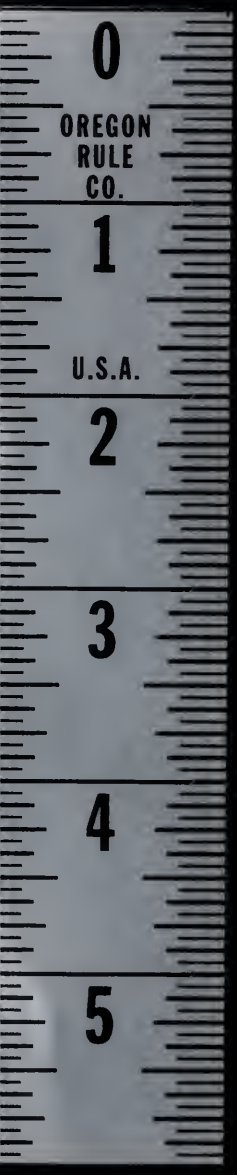
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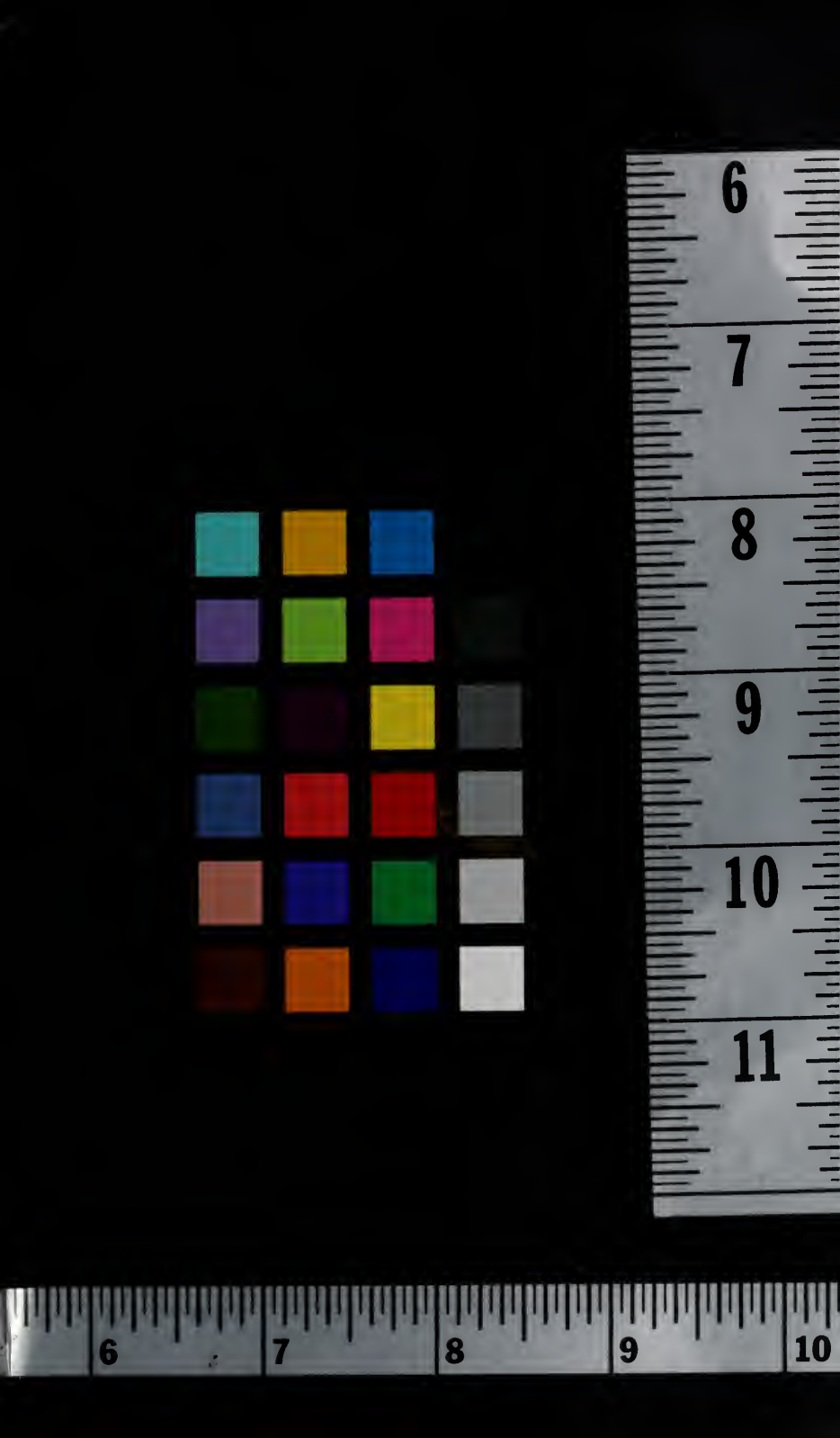

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